Casa San Miguel, Incorporated *and* Hospital & Health Care Workers Local 250, Service Employees International Union, AFL–CIO and Carol Bagley. Cases 32–CA–12812, CA–12832, 32–CA–12983, 32–CA–13070, 32–CA–13296, and 32–CA–13477

December 22, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 7, 1994, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Casa San Miguel, Incorporated, Concord, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The General Counsel and the Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding of various violations, we consider it unnecessary to rely on the judge's discussion of preelection campaign conduct in finding that the Respondent harbored union animus.

[2] We agree with the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally increasing wages. In so doing, we note that the Respondent's postelection conduct was unlawful under the rationale articulated in *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

We agree with the judge that discriminatee Annie Mariano's emotional, spontaneous, and provoked attempt to strike her supervisor in the face during a postdischarge discussion was not so flagrant as to require forfeiture of her remedial right to reinstatement and backpay. We do not rely on the judge's suggestion that the success or failure of such an assault determines the forfeiture issue. The Board reviews all circumstances relevant to the misconduct in deciding this issue on a case-by-case basis.

In agreeing with his colleagues that Mariano's conduct does not preclude the normal remedies, Member Cohen notes that the Respondent does not argue to the contrary.

Daniel F. Altemus, for the General Counsel.
Daniel T. Berkley, Jenny Kim, and *Karen V. Clopton (Berman, Berkley & Lasky)*, for the Respondent.
Paul D. Supton (Van Bourg, Weinberg, Roger & Rosenfeld), for the Charging Party, Local 250.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. An 11-day hearing was held in the above-captioned cases during May, June, and November 1993 and March 1994. This proceeding is based on: charges filed by Hospital & Health Care Workers Local 250 (the Union), against Casa San Miguel, Incorporated (Respondent), in Cases 32–CA–12812, 32–CA–12832, 32–CA–13070, 32–CA–13296, and 32–CA–13477; a charge filed by Carol Bagley against Respondent in Case 32–CA–12983; and, the complaints issued in the aforesaid cases, on behalf of the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, alleging that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Respondent filed timely answers to the complaints, denying the commission of the alleged unfair labor practices.[1]

The complaints allege Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct: on about September 24, 1992, engaged in the surveillance of its employees' union activities by videotaping employees on a union picket line; in May 1992 requested that employees Lodring Ignacio and Joanne Mejia engage in the surveillance of other employees' union activities and report the results of their surveillance to Respondent; on about October 26, 1992, Assistant Administrator Laura Smith told an employee that she did not want to hear the employee refer to the Union; on about August 3, 1993, through Shift Supervisor Judy Hughes, verbally promulgated a rule prohibiting the wearing of a union insignia on the employees' uniform, and has continued to maintain the rule; and, on August 12, 1992, discharged Shift Supervisor Bagley because she ''refused to carry out or to assist in the carrying out'' of the unfair labor practices alleged in the complaints issued in Cases 32–CA–12812, 32–CA–12832, 32–CA–12983, and 32–CA–13070, as well as other unfair labor practices never perpetrated.

The complaints allege Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct, because of the employees' union sympathies or activities: on May 18, 1992, discharged employee Nita Celarbo, on July 1, 1992, discharged employee Annie Mariano, on July 22, 1992, discharged employees Fe Calabiao, Estella Abueg, and Ethel Tarrosa, on July 23, 1992, discharged employee Angelito Bellon, and on September 20, 1993, discharged employee Caridad Guzman; in October 1992 issued several written counselings or reprimands to employee Luisa Yuson and on September 23, and October 24, 1992, January 28, and

[1] In its answers to the complaints Respondent admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard. Also, at the hearing, Respondent stipulated that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

March 22, 1993, issued written warnings to employee Ben Medina; in about June 1992, ceased offering overtime work to employees Ben and Emma Medina; on May 18, 1992, placed employee Tarrosa on probation, on July 22, 1992, suspended employees Florencio Baldoza, Frineo Llever, Ignacio, and Mejia, on September 4, 1992, suspended employee Llever, on February 19, 1993, suspended employee Guzman, and on March 25, 1993, suspended employee Ben Medina; on about October 7, 1992, ''effectuated a change in its employee tardiness policy regarding school class attendance and issued written counseling notices to 30 employees''; on November 26, 1992, discontinued its past practice of providing a free meal for its employees on Thanksgiving Day; and, since about January 9, 1993, failed and refused to assign employee Abella to ''on-call'' work and since about January 19, 1993, has refused to reassign Abella from ''on-call'' to full-time employment.

The complaints allege Respondent refused to bargain with the Union, within the meaning of Section 8(a)(5) of the Act, by changing its employees' existing terms and conditions of employment without affording the Union an opportunity to bargain with Respondent about the changes and their effect on the employees, as follows: on about October 7, 1992, changed its ''employee tardiness policy regarding school class attendance and issued written counseling notices to 30 employees''; on November 26, 1992, discontinued its past practice of providing a free meal for employees on Thanksgiving Day; in October 1992, granted a wage increase to its employees; and on about May 27, 1993, changed its vacation policy by issuing a memo stating that ''in the future no more than one CNA on vacation at a time on night shift.''

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent, a corporation, owns and operates a 200-bed skilled cared nursing and convalescent facility in Concord, California, for the elderly. Its residents, who are often referred to as patients, range from those totally unable to care for themselves to those in various stages of recuperation and rehabilitation.

Moshe Shenker, a part owner of Respondent, is its president. He is responsible for the Company's finances and marketing. Normally he does not involve himself in personnel matters. If he observes an employee engage in improper conduct, he brings it to the attention of either a charge nurse or a supervisor, who will handle the matter.

Lenore Shenker, the wife of Moshe Shenker, is Respondent's administrator. She is responsible for the day-to-day operation of the facility, including the operation of all of the facility's departments. She relies on the several department heads to do the day-to-day management of the facility, however, including the discipline of employees. In this last regard, she testified that ''most of the time'' the department heads are responsible for the discipline of the employees employed in their departments and, for ''the rest of the time,'' if a department head has a problem with an employee and brings it to L. Shenker's attention, L. Shenker and the department head discuss it.

The department involved in this case is the nursing department. Esther Van Baren has been Respondent's director of nursing since March 1991. Karen Meagher was Van Baren's assistant, assistant director of nurses, from approximately May 1992 [2] until October 7, when she left Respondent's employ and was replaced by Pat Rosen. Also involved in the management of the nursing department is Respondent's director of staff development, Julia Boeger, who has held that position since April. Boeger is responsible for the hiring and training of Respondent's certified nursing assistants (CNAs).

Van Baren decides whether nursing department employees are disciplined. She testified that a system of progressive discipline is followed in the nursing department: the employee is first counseled and, if that does not work, is issued a written disciplinary notice and, if that does not work, might be suspended and would then be terminated if the employee continued to engage in misconduct. Although this is the usual disciplinary procedure, Van Baren testified there are certain types of misconduct, which, by their very nature are so serious that when an employee engages in this misconduct the system of progressive discipline is not followed, instead the employee is either promptly suspended or discharged. Van Baren testified, however, Respondent normally uses a system of progressive discipline before suspending or discharging an employee and all of the supervisors employed in the nursing department know that this department follows the above-described system of progressive discipline.

Van Baren further testified there is a difference between a ''counseling and a disciplinary notice.'' She testified counseling is not discipline, but is ''in the form of one on one training or advising an employee of a particular problem that has been noticed, and the supervisor brings it to their attention.'' Likewise, Meagher testified that counseling reports issued to employees were not considered to be a form of discipline. More specifically, Meagher testified that ''a counseling is when you alert the CNA that there is a problem. Here's what we see is the problem. Don't let it happen again,'' and testified if the counseled employee repeated the offense, only then was the employee disciplined in the form of a either a verbal or written warning or by a suspension. Meagher also testified the system of discipline employed by Respondent ''generally was verbal counseling, then it was written counseling, then it was discipline'' and that the discipline could take various forms such as a written warning or a suspension.

The usual procedure followed in the nursing department concerning employee discipline, whether it involves the issuance of a written disciplinary notice or a discharge or suspension, is that the decision to discipline is made by Van Baren. She testified that all of the disciplinary notices issued in her department to employees by the supervisors or charge nurses are brought to her attention before they are issued to employees, and Van Baren is responsible for deciding what disciplinary action, if any, will be taken in each case. Van Baren conducts an independent evaluation of whatever disciplinary action the charge nurse or supervisor is recommending. More specifically, she testified when a charge

[2] Unless stated otherwise all dates refer to the year 1992.

nurse or supervisor prepares an employee disciplinary notice, the notice must first be submitted to her for approval before being issued to the employee, that in deciding whether or not to approve the recommended discipline she conducts an independent investigation that includes the following: speaking to the employee who is alleged to have acted improperly; speaking to other persons who might be able to shed light on the situation; reviewing the offending employee's personnel file to determine the length of time the employee has been employed by Respondents, and to determine if, during that period, the employee was disciplined for misconduct of the type now being attributed to the employee.

The employees employed in the nursing department are assigned to one of three shifts: ''day''; ''p.m.''; and ''night.'' The day shift is from 6:30 a.m. until 3 p.m., the p.m. shift is from 2:45 until 11:15 p.m., and the night shift is from 11 p.m. until 7 a.m.

The facility is divided into four numbered work stations, stations ''1'' through ''4.'' The central point of each station is the nursing desk. A licensed vocational nurse (LVN) is assigned to each station on every shift and has the title of ''Charge Nurse.'' It is the charge nurses who are the immediate supervisors of the work performed by the certified nursing assistants (CNAs) assigned to the stations. In addition, there is a registered nurse on each shift, with the title of nurse supervisor, to whom the shift's charge nurses report and who is responsible for the day-to-day operation of the shift.

The number of CNAs employed on a shift, depend on the shift and the patient census. During the times material to this case there were between approximately 12 and 20 CNAs employed on the p.m. shift, the shift that figures prominently in this case. The CNAs employed on the p.m. shift are 80-percent Filipino whose native language is Tagalog, the language of the Philippines.[3] This group of employees, while able to speak and understand English, are generally not as proficient in English as with their native language and generally are more comfortable when using their native language.

The CNAs perform a variety of services for the residents, all of whom are elderly and many of whom are unable to care for themselves in even the most basic everyday functions. The CNAs feed, clean, and clothe the residents and also move the residents about the facility. Each CNA is assigned to a group of residents, known as a ''run,'' and is primarily responsible for the care of those residents, although it is understood that a CNA will assist with other residents when the need arises.

On August 13, the Union in Case 32–RC–3596 filed a representation petition with the Board's Regional Office seeking to have the Board hold a representation election in a voting unit that included Respondent's CNAs and LVNs. Subsequently, pursuant to a stipulated election agreement approved on September 3 by the Board's Regional Director, the Board in Case 32–RC–3596 conducted a secret-ballot representation election on September 25 in a voting unit that included the CNAs and LVNs.[4] A majority of the eligible employees voted in favor of union representation. Respondent filed timely objections to the conduct of the election and on October 22 the Regional Director issued his report recommending the objections be overruled in their entirety and the Union be certified as the employees' exclusive bargaining representative.

On April 5, 1993, the Board in an unpublished decision directed that a hearing be held for the purpose of receiving evidence concerning Respondent's Objections 1 through 3. This matter was consolidated for hearing with the unfair labor practice allegations that are the subject of this proceeding. During the hearing in this proceeding, after having received all of the evidence relevant to the issues posed by Respondent's election objections, I severed Case 32–RC–3596 from the instant proceeding and on July 14, 1993, issued my report and recommendations on objections in that case. I recommended that Objections 1 through 3 be overruled and that the Board certify the Union as the exclusive bargaining representative of the unit employees. Subsequently, on April 8, 1994, in an unpublished decision the Board adopted my recommendation and certified the Union as the exclusive collective-bargaining representative of the unit employees.

Respondent is opposed to its employees being represented by the Union and has expressed its opposition to the employees. In this regard, the parties stipulated that between August 12 and September 25 Respondent's employees were required to attend meetings held during working hours when management presented Respondent's position about the union representation election. It is undisputed that present for management at some of those meetings were M. and L. Shenker, Van Baren, Meagher, and Boeger. It is also undisputed that during some of those meeting Respondent's management representatives indicated to the employees Respondent was opposed to the employees being represented by the Union, stated it was their opinion the Union would do the employees no good, and explained to the employees the reasons why Respondent felt the employees would be better off without union representation.

In early May several of the p.m. shift employees including Lodring Ignacio, Joanne Mejia, Ethel Tarrosa, Luisa Yuson, Nita Celarbo, Florencio Baldoza, Angelito Bellon, and Irineo Llever, on several occasions, while in the facility's breakroom and in the facility's parking lot, discussed the subject of union representation. Also during this period, on or about May 9, p.m. shift employees Annie Mariano and Caridad Guzman, who are sisters, met at Guzman's home with Union Representative Griffith. Subsequently, on May 23, approximately 10 of the p.m. shift employees including Tarrosa, Mariano, Baldoza, Abueg, Yuson, and Celarbo, met with Union Representative Griffith at Guzman's home. Following the May 23 meeting the p.m. shift employees continued to discuss the subject of union representation and the possibility of having the Union represent them. It was not until late July, however, that the Union intensified its organizational campaign. Commencing in the last week of July and continuing to the week of the September 25 representation

[3] Respondent's work force is 75-percent Filipino.

[4] The voting unit that Respondent admits in its answer to the complaints is an appropriate bargaining unit for purposes of collective bargaining was as follows:

All full time and regular part time employees, including LVN's, CNA's, Dietary, Laundry, and Housekeeping employees, Sterilization Workers, Restorative aides, and maintenance employees employed by Respondent at its Concord, California facility; excluding all professional employees, office clerical employees, guards and supervisors as defined by the Act.

election the Union held a series of five organizational meetings at the home of day-shift employee Ben Medina. Also, during the last week of July, employees who were union adherents, began to wear buttons at work that stated they favored union representation. On July 28 Baldoza was the first p.m. shift employee to wear a union button on his uniform at work and subsequently, on July 31, several of the other p.m. shift employees began wearing union buttons on their uniforms at work. As noted supra, it was on August 13 that the Union filed its petition for a union representation election in Case 32–RC–3596.[5]

B. *The Alleged Independent 8(a)(1) Violations*

1. Respondent asks employees Lodring Ignacio and Joanne Mejia to spy on other employees' union activities

The complaint alleges Respondent violated Section 8(a)(1) of the Act by requesting that employees Lodring Ignacio and Joanne Mejia ''engage in the surveillance of fellow employees' union activities and report the results of such surveillance to Respondent.'' The evidence pertinent to this allegation and an evaluation of the evidence follows.

On July 30, when P.M. Shift Supervisor Carol Bagley discovered that one of CNA Mejia's patients, who was not able to leave her bed, had not been turned in her bed, Bagley verbally reprimanded Mejia for not having turned the patient and instructed her to do so. Immediately thereafter, Bagley discovered Mejia and Ignacio, another CNA on the p.m. shift, in another patient's bedroom with the door closed speaking loudly in Tagalog, apparently about the fact that Bagley had verbally reprimanded Mejia for not having turned a patient. Mejia and Ignacio should have been taking care of their assigned patients.

It is undisputed that Mejia and Ignacio acted contrary to company policy when on July 30 they engaged in their above-described conduct. In view of this, on July 30, Bagley prepared two written disciplinary notices encompassing this conduct—one for Mejia and the other for Ignacio—but consistent with company policy did not issue them immediately to Mejia or Ignacio. Instead, at the end of her shift that night she left them in an envelope in Nursing Director Van Baren's office for Van Baren to approve their issuance when Van Baren came to work the next day.

The next day, July 31, when Bagley arrived for work she found a note at the timeclock asking her to come to Van Baren's office because Assistant Nursing Director Meagher wanted to speak to her. When Bagley went to the office, Meagher, who was there by herself, was holding Mejia's and Ignacio's disciplinary notices that Bagley had left in the office the night before. Meagher asked Bagley, ''[A]ren't we getting a little bit carried away with these write ups?'' Bagley replied, ''[N]o,'' that she did not believe so and stated she thought not turning a seriously ill patient constituted a serious nursing infraction and felt she was justified in issuing the writeups. Meagher responded by instructing Bagley to forget the writeups and told Bagley that she, would take care of the writeups, and explained to Bagley that Mejia and Ignacio ''were informants for the Shenkers . . . and that they were to mingle with the employees to find out about the Union activities, and [Mr. Shenker] wasn't going to be . . . very happy with this.''

The above description of what occurred on July 30 and 31 is based on Bagley's testimony that was uncontroverted in all but one respect; namely, when Respondent's counsel asked Meagher, ''[D]id you at any time tell Carol Bagley that Joanne Mejia and Lodring Ignacio were informants for the employer concerning Union activity,'' Meagher testified, ''[A]bsolutely not.'' Meagher was not questioned about her above-described July 31 meeting with Bagley and did not deny she spoke to Bagley on about July 31 about the July 30 disciplinary notices prepared by Bagley for issuance to Mejia and Ignacio. Nor did Meagher deny that she in effect told Bagley to forget about those disciplinary notices because Meagher would take care of them.

I credit Bagley's above-described testimony in its entirety because when she gave this testimony her testimonial demeanor—the way she spoke, the tone of her voice, and the way she looked and acted—led me to believe she was a sincere and conscientious witness, whereas the testimonial demeanor of Meagher was poor.

As described supra, pursuant to Respondent's usual procedure it was Nursing Director Van Baren's responsibility to evaluate the disciplinary notices prepared by Bagley on July 30 concerning Mejia's and Ignacio's conduct that day. Van Baren failed to testify why her assistant, Meagher, spoke to Bagley about these disciplinary notices rather than Van Baren, when it was Van Baren who conducted the investigation into the allegations set forth in the notices. Van Baren testified she investigated the allegations set forth in the discipline notices Bagley had prepared for Mejia and Ignacio, and further testified that based on her investigation ''did not feel they were justifiable, but it's a judgment call. I did not know for sure. I let them stand. I was concerned about them, but I let them stand.''

Van Baren, whose testimonial demeanor was poor when she gave this testimony, did not explain who she spoke to or what she did when, as she testified, she investigated the allegations set forth in the disciplinary notices. It is undisputed she did not speak to Bagley about the disciplinary notices, rather it was Meagher who spoke to Bagley about the notices, and it is also undisputed that when Meagher spoke to Bagley about the notices it was not in the nature of an investigatory interview. Moreover, Van Baren's further testimony that she allowed Mejia's and Ignacio's disciplinary notices to ''stand'' is controverted by what occurred. If the disciplinary notices had been allowed to stand, someone in supervision, most probably Bagley, would have issued the notices to Mejia and Ignacio and/or at the very least notified them verbally that they had been issued these disciplinary notices. This was not the case, for, as I have found supra, Bagley was instructed by Meagher to forget about the disciplinary notices and told that Meagher would take care of them. Moreover, it is undisputed that Bagley was never in-

[5] The above findings concerning the employees' union activity are based on a composite of the testimony of the following witnesses: Tarrosa, Celarbo, Bellon, Medina, Llever, Calabiao, Guzman, Mariano, and Baldoza. Respondent's director of nurses, Van Baren, testified it was not until ''the week after August 12,'' that she first observed employees wearing union buttons at work. I reject this testimony because Van Baren's testimonial demeanor was poor when she testified about her knowledge of the employees' union activity. As I have discussed infra, she was in general a dishonest and an unreliable witness.

formed that Mejia and Ignacio were disciplined as recommended by Bagley. In fact, the disciplinary notices were not placed in Mejia's or Ignacio's personnel files, which would have been the case if Van Baren had decided to accept Bagley's recommendation and issued the disciplinary notices. Rather, the notices, which had been placed in Bagley's personnel file, were only belatedly placed in the personnel files of Mejia and Ignacio on January 4, 1993, after the pertinent charges had been filed in this case and after the Board had commenced its investigation into those charges. It is for the foregoing reasons, including Van Baren's poor testimonial demeanor, that I have rejected Van Baren's testimony that she let ''stand'' the July 30 disciplinary notices prepared by Bagley for issuance to Mejia and Ignacio. Rather, I find Van Baren did not allow those disciplinary notices to ''stand.''

Based on the foregoing, I find that on July 31 Assistant Nursing Director Meagher informed Bagley Respondent had decided not to discipline employees Mejia and Ignacio, contrary to Bagley's July 30 disciplinary notices, because Mejia and Ignacio had agreed to mingle with the other employees to find out about their union activities and act as informants for Respondent.

I further find that this admission by Meagher, a high-ranking management official who would ordinarily be privy to such information, warrants the inference that, as alleged in the complaint, Respondent requested employees Mejia and Ignacio to ''engage in the surveillance of their fellow employees' union activities and report the result of such surveillance to Respondent,'' and by engaging in this conduct Respondent violated Section 8(a)(1) of the Act.

I note that neither M. or L. Shenker nor Van Baren denied this allegation or otherwise repudiated Meagher's admission, nor did Respondent call either Mejia or Ignacio to rebut the General Counsel's prima facie showing, based on Meagher's admission, that Mejia and Ignacio were spying on other employees' union activities on Respondent's behalf. In so concluding, I considered Respondent's contention that it is not credible that because Mejia and Ignacio agreed to act as Respondent's informants, on July 31 Respondent ignored Mejia's and Ignacio's misconduct, in view of the fact that previously on July 22 Mejia and Ignacio had been suspended by Respondent for abandoning their work station. I disagree. Respondent's contention rests on the assumption that it was prior to July 22 that Mejia and Ignacio agreed to act as Respondent's informants, rather than subsequent to that date. Moreover, the inference that Respondent's unexplained failure to discipline Mejia and Ignacio for their July 30 misconduct was due to Mejia's and Ignacio's agreement to act as Respondent's informants is consistent with the following evidence: despite the seriousness of their July 21 misconduct, the abandonment of their patients for a substantial period of time, which was serious enough so as to result in Respondent's decision to suspend them, they received no discipline whatsoever for their July 30 misconduct; and, despite the seriousness of their July 21 misconduct and the fact that they had engaged in further misconduct on July 30, they were named by Respondent's management as ''Employee of the Month'' for the nursing department for the months of August and September for which they received cash bonuses.

2. On September 24 Respondent videotapes its employees when they picket Respondent in support of the Union's organizational campaign

The complaint alleges that on September 24 Respondent violated Section 8(a)(1) of the Act by engaging in the surveillance of its employees' union activities when it videotaped employees on a picket line. The undisputed evidence pertinent to this allegation and my evaluation of the evidence follows.

On September 24, the day before the scheduled representation election in Case 32–RC–3596, the Union conducted a demonstration on the sidewalk in front of Respondent's facility, which included the picketing of Respondent's facility. Several of Respondent's employees attended the demonstration and participated in the accompanying picketing.

On September 24 when the demonstration and the accompanying picketing began, Respondent's maintenance and housekeeping supervisor, Vera Lacuna, went to the roof of Respondent's facility where she set up a video camera on a tripod. Then, in full view of all those on the ground in front of the building, focused the camera on the persons attending the demonstration and participating in the picketing. During the demonstration and the picketing that accompanied it, Lacuna filmed the proceedings, while at the same time she held in her hands a note pad and pen and made what apparently were notes of who was present and what was occurring.

There is no contention or evidence that the demonstrators, including the picketers, crossed onto Respondent's property, or obstructed anyone from entering or leaving the Respondent's facility, or otherwise engaged in impermissible conduct.

The law is settled that absent proper justification, an employer's videotaping of employees' union activity violates the Act because it has a tendency to intimidate and the mere belief that something might happen does not justify the employer's videotaping when balanced against the tendency of that conduct to interfere with the employees' right to engage in union activity. See *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), and cases cited therein.

Respondent's president, M. Shenker, testified Respondent decided to videotape the employees' union activity because it wanted to be sure that none of the picketers crossed onto Respondent's property. He testified the reason Respondent was concerned about this happening was on three occasions employees' motor vehicles had been vandalized while parked in Respondent's parking lot. More specifically, he testified that on July 21 the p.m. shift supervisor's motor vehicle had been vandalized and that prior to July 21, on dates that President Shenker was unable to recall, the motor vehicles of two other employees had been vandalized while parked in Respondent's parking lot.

President Shenker's reason for videotaping the employees' union activity does not justify this conduct because, as I have noted supra, the law is settled that an employer's mere belief that something might happen did not justify the videotaping. In any event, I am persuaded that President Shenker's testimony is not credible and that he did not really believe the picketers might enter Respondent's parking lot and vandalize parked motor vehicles that were parked there or otherwise damage property. There is no evidence whatsoever that Respondent had reason to believe that the vandalization of the three motor vehicles, which M. Shenker testified about, were related to the employees' union organizational campaign. In

fact there is no evidence that two of the three instances of auto vandalization even occurred during the period of time when the employees were engaged in their campaign to organize a union. For these reasons and because of President Shenker's poor testimonial demeanor when he testified about this matter,[6] I am persuaded that in videotaping the employees' September 24 union demonstration and the accompanying picketing, and in having Supervisor Lacuna take notes of these activities, and in engaging in this conduct in a manner that would be sure to make the employees aware of what it was doing, Respondent's purpose was to intimidate those employees who attended the Union's demonstration and participated in the picketing.

Lechmere, Inc., 295 NLRB 92, 98–100 (1989), relied on by Respondent, is distinguishable. There the employer's videotaping of the employees' union activity was done by a rooftop video camera which, during the employer's normal course of business, was located on the roof for the purpose of preventing the vandalization of customers' and employees' cars parked in the employer's parking lot and to allow the employer to follow shoplifters out of its store. Here, the video camera was placed on Respondent's roof just for the purpose of observing the employees' union activity. It was not a part of a security system designed to protect Respondent's facility during the normal course of doing business. Moreover, the record indicates Respondent does not have such a system and did not implement such a system even after the three employees' motor vehicles had been vandalized in Respondent's parking lot. Respondent's failure to institute such a security system or even to institute some security measures designed to prevent the vandalization of motor vehicles parked on its parking lot buttresses my conclusion that President Shenker was not a credible witness when he testified it was Respondent's concern about the possibility of picketers vandalizing motor vehicles parked in the parking lot that motivated Respondent's decision to videotape the employees' September 24 union picketing of the facility.

Based on the foregoing, I find Respondent violated Section 8(a)(1) of the Act, when on September 24 it videotaped its employees' union activity without proper justification.

3. Assistant Administrator Laura Smith tells employee Luisa Yuson not to discuss the Union

The complaint alleges Respondent violated Section 8(a)(1) of the Act when on October 26 Assistant Administrator Laura Smith ''stated she did not wish to hear an employee referring to the Union.'' The evidence pertinent to this allegation and its evaluation follows.

During the time material, Laura Smith was Respondent's assistant administrator. Her office was next to Administrator L. Shenker's office. Smith was regarded as a member of management and as an equal to Nursing Director Van Baren in the managerial hierarchy. She attended the daily management meeting held for all of Respondent's department heads. Smith's day-to-day duties concerned workers' compensation matters, public relations, and the processing of incoming patients. In addition, Smith was the person placed in charge of the facility, when the administrator was absent for more than 1 month. This occurred on at least one occasion in 1992, prior to the events material to this case. In view of the aforesaid circumstances, I find Respondent placed Smith in a position so that whatever she stated to the employees about the Union would have been reasonably construed by the employees as having been said on behalf of Respondent. I, therefore, find under the doctrine of apparent authority that Smith's remarks about the Union, described infra, are attributable to Respondent.

As discussed more fully infra, CNA Luisa Yuson, who, on October 23, was issued two disciplinary notices by Director of Staff Development Boeger, was called to Smith's office on October 26, where, in the presence of Nursing Director Van Baren and Assistant Nursing Director Rosen, she received a third disciplinary notice from Smith for not following Respondent's workers' compensation procedure in connection with a work-related injury.[7]

It is undisputed that during the October 26 meeting Yuson brought up the subject of the Union. According to Yuson's testimony the subject was raised when Smith accused Yuson of being ''mad'' at Boeger and Yuson responded by denying this and stating it was Boeger that was mad at Yuson because of Yuson's union sympathies, whereupon Smith stood up and angrily pounded the table with her fist and stated she did not want to hear anything ''here'' about the Union. Van Baren, on the other hand, testified that the subject of the Union was raised when Yuson stated the reason she was not feeling good had to do with ''everything that was going on with the Union'' and Smith replied, ''[T]hat's not what we're discussing. We're discussing the workmen's compensation issue and I don't wish to talk about that right now.''

As indicated elsewhere in this decision, Van Baren's demeanor was generally poor when she testified. When Yuson testified about the part of the October 26 meeting at issue, however, I received the impression from the way she looked and from the manner of her testimony that her recollection of that part of the meeting was unreliable having been dulled by the passage of time, and that even after having her memory refreshed by what she stated in the affidavit submitted to the Board, she was not a reliable witness when she testified about the part of the October 26 meeting involved herein. In this last regard, even after having her memory refreshed by her affidavit, Yuson's testimony given about this part of the meeting during direct and cross-examination differed in significant respects. Yuson testified on direct examination she told Smith that Boeger was mad at her ''because I am in the Union'' and Smith replied, ''I don't want to hear anything about the Union here,'' whereas, during cross-examination Yuson testified she told Smith that Boeger was mad at Yuson ''because I mentioned something about the Union'' and Smith replied, ''I don't want to hear anything about the Union in this facility.''

Yuson's initial testimony that Smith stated she did not want to hear anything about the Union ''here,'' when viewed in context, is plainly a reference to the October 26 meeting between Yuson and Smith that concerned the disciplinary no-

[6] I note that neither Administrator L. Shenker, who President Shenker testified was a party to the decision to videotape, nor Supervisor Lacuna, who did the videotaping, were called on to corroborate President Shenker's testimony concerning the purpose of the videotaping.

[7] Only Van Baren and Yuson testified about this meeting. Van Baren did not deny Rosen was present.

tice being issued by Smith to Yuson. This testimony is perfectly consistent with Van Baren's testimony that when Yuson brought up the subject of the Union, Smith told her that because the Union was not what they were there to discuss, Smith did not want to talk about the Union at that time.

It is for the above reasons that I find Yuson's above-described testimony concerning the October 26 meeting, insofar as it was controverted by Van Baren's testimony, was unreliable and for this reason I credit that part of Van Baren's testimony that controverted Yuson's.

Based on the foregoing, I find that at the October 26 meeting, when Yuson brought up the subject of the Union, Smith stated that as they were there to discuss a matter concerning workers' compensation and not the Union that she did not want to talk about the Union at that time. I further find, under the circumstances, that by precluding Yuson from discussing the Union during this meeting, Smith did not infringe on Yuson's statutory right to speak about the Union. I, therefore, shall recommend that this allegation be dismissed.

4. Respondent prohibits employees from wearing at work a prounion emblem and message printed on their work uniform

Respondent's CNAs are required to wear a uniform; a white smock that has a breast pocket. On August 3, 1993, CNA Caridid Guzman, employed on the p.m. shift, came to work wearing a white smock that had printed in black above the front breast pocket the words ''One Powerful Voice for Health Care Workers'' and had printed immediately below on the pocket in black and gold the words ''Local 250 S.E.I.U.,'' with the word ''Yes'' along side of a box that contained a checkmark. In August 1992, the period immediately preceding the September 25 representation election, Guzman had commenced wearing to work this uniform with the Union's message, and since August 1992 had worn it to work 1 day each week.

On August 3, 1993, Judy Hughes, the p.m.-shift supervisor, who is admittedly a supervisor within the meaning of Section 2(11) of the Act, told Guzman that Guzman could not wear the uniform with the Union's emblem and message anymore because of orders from Respondent's management. Guzman obeyed.

The complaint alleges that on or about August 3, 1993, acting through Hughes, Respondent violated Section 8(a)(1) of the Act by verbally promulgating a rule prohibiting the wearing of a union insignia on employees' uniforms and by continuing to maintain that rule. Thus, the question for decision is whether Respondent violated Section 8(a)(1) by prohibiting Guzman from wearing a work uniform at the facility because it had a prounion emblem and message printed on the front. The applicable legal principles governing this question have been set forth by the Board in *Mesa Vista Hospital*, 280 NLRB 298, 299 (1986), as follows (footnotes omitted):

> [E]mployees have the right to wear union insignia even while at work. A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid. Outside immediate patient care areas, and outside other areas where the hospital establishes an adverse effect on patient care, employees retain the right to wear union insignia while working. An employer may further restrict the right by demonstrating ''special circumstances.''

Guided by the above principles, I find Respondent did not violate the Act by refusing to allow Guzman to wear her uniform to work with a prounion insignia and message printed on the front. As noted in *Mesa Vista Hospital*, supra, the Act does not prohibit Respondent from refusing to allow its employees to wear such a uniform during those periods of time they work in patient care areas. I considered that Respondent's prohibition also prevents the employees from wearing these uniforms in nonpatient care areas of the facility such as the nurses' break area. Unlike those situations, however, when an employee *attaches* something to the employee's work uniform, such as a union button, which indicates that the employee is supporting union representation, the Union's insignia and message involved in this case was a part of the employees' uniform and could not be removed. It is not practical or possible for an employee when in nonpatient care areas to wear a uniform with a printed prounion emblem and message on the front, and then to change out of that uniform, each time the employee enters a patient care area. In view of these ''special circumstances'' and because the CNAs were required as a condition of employment to wear the uniform involved, I am of the view Respondent was privileged under the Act to inform Guzman she could not wear that uniform to work with a union emblem and message printed on the front. In so concluding I also note there is no contention or evidence that when employees attach union buttons to their uniforms while at work, Respondent refused to allow them to wear those buttons. Nor is there any contention or evidence that while prohibiting its employees from wearing uniforms with a prounion emblem or message printed on the front of the uniform, Respondent permitted the employees to wear uniforms on which other kinds of emblems or messages were printed. It is for the foregoing reasons that I will recommend the dismissal of this allegation.

5. The August 12 discharge of P.M. Shift Supervisor Carol Bagley

a. *The evidence*

On June 30 Respondent's p.m. shift supervisor, Eva Suitos, abruptly quit her job. To fill this vacancy Respondent contacted the local nursing registry service and asked it to send a registered nurse qualified to work as the p.m. shift supervisor. The registry referred Carol Bagley, a registered nurse with approximately 30 years of experience. On July 1 she began to work on the p.m. shift. This was not the first time Bagley had worked at Respondent's facility. During the year prior to July 1, on no more than six occasions, she had worked at the facility as a registry employee as the night-shift supervisor.

On Friday, July 3, after Bagley had worked 1 or 2 days as a registry employee on the p.m. shift, Respondent's director of staff development, Julia Boeger, who hires Respondent's nurses, asked Bagley to work for Respondent as its p.m. shift supervisor. Bagley told Boeger that if she accepted the job she would not be available to work weekends. Boeger stated the job did not require her to work weekends, that it was a Monday-through-Friday job that paid $18 per

hour. Bagley expressed her dissatisfaction with the rate of pay and asked to speak to the Respondent's owners. Boeger stated the owners were out of the country and when they returned Bagley could discuss her rate of pay with them and asked Bagley to start work as p.m. shift supervisor on Monday, July 6. Bagley agreed and on July 6 began to work in Respondent's employ as its p.m. shift supervisor.

The p.m. shift supervisor, as is true of the other shift supervisors, is in charge of the nursing employees employed on the shift and is admittedly a supervisor within the meaning of Section 2(11) of the Act. The p.m. shift supervisor is normally the highest ranking supervisory official on the premises after approximately 5 p.m., when Nursing Director Van Baren usually leaves the facility.

Bagley worked as Respondent's p.m. shift supervisor from July 6 until August 12, when she was discharged. As is the case for all of Respondent's employees, Bagley's first 90 days of employment was regarded as a probationary period.

On July 6, before starting work, Bagley met for a few minutes with Van Baren and Meagher in Van Baren's office. After they welcomed Bagley, Meagher, who did most of the talking, stated she was happy that Bagley was ''white'' because Respondent had a very serious problem with the Filipinos employed on the p.m. shift, that the Filipinos were all related to one another like a ''tribe,'' that Respondent had disciplinary problems with them, that they did what they felt like doing, that they were not truthful, and that they were stealing from Respondent. Van Baren added that the Filipinos did what they wanted to do and did not speak English. Meagher spelled out for Bagley, ''Tagalog,'' which is the language the Filipinos spoke.

Meagher handed Bagley a stack of approximately 40 blank employee disciplinary notices. She told Bagley to write up such notices for ''everything'' and give them to ''anybody,'' and instructed her to place the notices she prepared in an envelope and place them under the door of Van Baren's office and that Van Baren would take care of them the next day when she came to work. Bagley was cautioned by Meagher not to write or say anything ''racial.''

Also, during this meeting, Meagher told Bagley the Filipinos were ''troublemakers'' who wanted to start a union, and that employees Joanne Mejia and Lodring Ignacio were prounion activists. Van Baren agreed with Meagher's observation that the Filipinos employed on the p.m. shift wanted to start a union, and told Bagley Respondent did not need a union. Bagley asked what was wrong with a union and stated she did not see any harm in a union. Van Baren and Meagher advised Bagley to wait and she would see what was wrong with a union.

The above description of Bagley's July 6 meeting with Van Baren and Meagher is based on Bagley's testimony. Van Baren and Meagher gave substantially different accounts of this meeting. Their testimony is set forth as follows.

Van Baren testified that on July 6 she briefly spoke to Bagley, in Meagher's presence, in a hallway. She testified she introduced herself, apologized for not having the time to sit down and speak with Bagley just then, told her she had a problem keeping p.m. shift supervisors, that there was a problem with patient care on the p.m. shift because the CNAs did not answer the patients' call lights, were absent from their work stations when they should be on duty, that English was not always spoken in front of the patients, and told Bagley to make sure this type of conduct did not occur and stated they would discuss more of Bagley's duties at a later date. Van Baren denied anything derogatory about Filipinos was said during this meeting or that the subject of a union was mentioned.

Van Baren further testified she and Meagher had a second meeting with Bagley about Bagley's job duties and that it took place during the week of July 12, in Van Baren's office. According to Van Baren, at this meeting Van Baren discussed the following problems that had been occurring on the p.m. shift: patients' call lights not being answered by the employees; employees being absent from their work stations; and employees reading while on duty instead of answering call lights. Van Baren testified that at this second meeting she also told Bagley she expected the nurses to be where they were supposed to be and to do their jobs, and showed Bagley the employee disciplinary notice form used by Respondent's supervisors to discipline employees and explained to Bagley that Van Baren needed to have a written record before disciplining an employee because Van Baren could not discipline an employee based on hearsay such as a complaint from a patient's family, but needed more specific information. According to Van Baren, the meeting ended with Van Baren informing Bagley that Van Baren wanted to be upfront with Bagley about the p.m. shift's problems, that in the past the p.m. shift had a great many supervisors, most of whom had quit or demanded to be transferred to another shift.

In several significant instances Meagher's testimony does not corroborate or jibe with Van Baren's. She failed to corroborate Van Baren's testimony about the second meeting supposedly held in Van Baren's office between Van Baren, Meagher, and Bagley, during the week of July 12. Rather, Meagher testified it was on July 6 that Bagley was summoned to Van Baren's office, where, at that time, Van Baren and Meagher spoke to Bagley about her job. Meagher's testimony about this meeting was vague and evasive. It was devoid of specificity. She testified that all Van Baren said at the July 6 meeting was to repeat to Bagley what Meagher had previously told Bagley on July 1, when Bagley first came to work as a registry employee.

The record reveals that on July 1 Meagher merely refreshed Bagley's memory about the way Respondent conducted its operations and explained the duties of the p.m. shift supervisor and told Bagley it was imperative that the nurses speak English in patient care areas. Meagher denied that on July 6 she told Bagley she was happy Bagley was white, or there was a problem with the Filipino employees, or the Filipinos were ''troublemakers,'' or they wanted to start a union, or handed Bagley a stack of employee disciplinary notices. Meagher testified all that was spoken about at the July 6 meeting was ''how the shift was to be run.'' Other than this vague account of the meeting, however, Meagher was unable to provide any of the specifics that either herself or Van Baren spoke to Bagley about. In fact she testified she did not remember anything Van Baren said at this meeting.

I also note that Van Baren's testimony that during her meeting with Bagley on July 6 and the week of July 12, that Van Baren told Bagley there were serious employee disciplinary problems on the p.m. shift, is contradicted by Meagher's testimony. Meagher testified that as of July 6, when Bagley took over the position of p.m. shift supervisor,

there were no serious personnel disciplinary problems on the p.m. shift, but ''just little minor things.'' Meagher further testified if there were ongoing problems with the personnel employed on the p.m. shift that Meagher would have known of them. Meagher testified that the only personnel problems that occurred on the p.m. shift that she knew of involved ''just little things.''

In crediting Bagley's account of her July 6 meeting with Van Baren and Meagher and rejecting Van Baren's and Meagher's testimony, I considered the above-described inconsistencies in Van Baren's and Meagher's testimony and their failure to corroborate one another, but the most significant consideration in my crediting of Bagley's testimony was Bagley's testimonial demeanor was good, whereas the testimonial demeanor of Van Baren and Meagher—the way they spoke, the tone of their voice, and the way they looked and acted while testifying—led me to believe they were not sincere, conscientious, or reliable witnesses, but were interested only in tailoring their testimony to suit Respondent's case.

In mid- and late-July, on more than one occasion, when Bagley and Meagher spoke about business-related matters, at the end of their conversations, Meagher brought up the subject of the employees' union activity, as follows.

Meagher asked if Bagley overheard the employees speaking about the Union. Bagley replied they did not speak about the Union in her presence. Meagher gave Bagley the following instructions concerning the employees' union activity: if Bagley observed employees wearing union buttons to tell them to remove them; if Bagley observed union literature or notices of union meetings posted in the breakroom to remove them; and told Bagley that the employees were not allowed to discuss the Union and, if employees discussed the Union or wore union buttons or posted union materials, that Bagley was to write their names down and give those names to Meagher. Bagley replied she believed it was illegal to write up employees for discussing the Union, told Meagher employees could talk about whatever they wanted during their break periods, and asked Meagher what was wrong with the Union.

Also, once during this period when Meagher spoke to Bagley about the employees' union activity, Meagher told Bagley if the Union succeeded in getting into the facility, there would not be many of the employees left in Respondent's employ, explaining to Bagley she intended ''to get rid of the problem and get rid of all of [the employees] if she had to,'' and declared that Respondent intended ''to clean house.''

Lastly, at the end of July, Meagher asked if Bagley had followed Meagher's above-described instructions concerning the employees' union activity. Bagley replied by stating she had not followed Meagher's instructions because it was not her job to engage in that type of conduct and she felt that what Respondent wanted her to do was illegal.

The above findings concerning Meagher's mid- and late-July conversations with Bagley about the employees' union activity are based on Bagley's testimony. Meagher testified she never issued instructions to Bagley about the employees' union activity or instructed her to have the employees remove their union buttons from their uniforms. Meagher testified that once, on an undisclosed date, she instructed Bagley to remove notices about union meetings posted in the time-clock area because no notices were supposed to be posted there. I rejected Meagher's testimony and credited Bagley's because Bagley's testimonial demeanor was good, whereas Meagher's was poor.

Early in August, Meagher told Bagley Respondent needed a ''strong person'' to work weekends as the p.m. shift supervisor and thought Bagley should do so. Bagley refused to accept the assignment. She told Meagher she had been hired to work only weekdays and did not want to work for Respondent on the weekends because on those days she was available for work through the local nurses registry service and did not want to give up that weekend work.

This description of Meagher's early August conversation with Bagley about working weekends is based on Bagley's testimony. Meagher testified she had no discussion with Bagley about working weekends. I credited Bagley's and rejected Meagher's testimony because of Bagley's good and Meagher's poor testimonial demeanor.

Van Baren testified that on August 3 she met with Bagley in her office, just the two of them, at which time she criticized Bagley's work performance in several respects and, during the meeting, recorded in writing the substance of what was stated by herself and Bagley in the form of an ''Employee Counseling Report,'' General Counsel's Exhibit 27, herein sometimes referred to as the August 3 counseling report. The August 3 counseling report that admittedly was not given to or shown to Bagley is dated August 3 and signed by Van Baren and in Van Baren's handwriting it states that Van Baren discussed with Bagley, ''the following'':

> 1. Conflicting stories re incident reports—Carol [Bagley] stated all her write ups were true and factual.
>
> 2. Racial remarks—many employees have complained she is making them—Carol [Bagley] denies this and I told her this will not be tolerated.
>
> 3. States—p.m.'s is going better—in light of all the complaints I'm getting I told Carol there needs to be a line between harsh and strict.
>
> 4. Requested Carol use her name not ''Pepper'' while on duty.

Van Baren testified that during their August 3 meeting she told Bagley she was concerned about the employee writeups she had been receiving from Bagley because when Van Baren spoke to the employees about those writeups she got conflicting stories, that ''everyone'' was in an ''uproar'' about Bagley's supervisory style, and not one of the persons whom Van Baren had spoken to on the p.m. shift was ''supportive'' of Bagley. When Bagley responded by stating she thought things were ''going better on the shift,'' Van Baren testified she informed Bagley that all of the employees were upset, that Van Baren believed Bagley had not drawn the line between ''strict and harsh,'' and told Bagley she had rescinded a couple of Bagley's writeups. Van Baren also testified she asked Bagley to use her professional name over the facility's public address system rather than her nickname ''Pepper,'' asked what Bagley had said that caused employee Martinez to believe Bagley had made a racial remark, and Bagley replied her remark was ''not meant that way.'' The meeting ended, according to Van Baren's testimony, with Van Baren stating she would meet with Bagley each week to see where things were going.

Van Baren testified that the August 3 meeting was prompted by Bagley's actions that Van Baren had personally observed and by complaints made to Van Baren by nurses on the p.m. and other shifts, which caused Van Baren to be concerned that Bagley was not performing her job duties. On account of Bagley, Van Baren testified the p.m. shift was in an ''uproar'' and some of the day-shift nurses refused to work on the p.m. shift because of Bagley's conduct.

Van Baren's testimony that there was a meeting between herself and Bagley on August 3 during which she criticized Bagley's work performance and memorialized what was said in the August 3 counseling report was corroborated by Meagher's testimony. Meagher testified she was present on August 3 in Van Baren's office when Van Baren spoke to Bagley about the matters contained in the August 3 counseling report and that Meagher observed Van Baren write that report. I am convinced, however, that Meagher's testimony was a fabrication tailored by Meagher to suit Respondent's case. Initially, I note her testimony does not jibe with Van Baren's, who testified that on August 3 she met with Bagley alone. In addition, Meagher initially testified that Van Baren prepared the August 3 counseling report prior to a meeting of management officials held in late July to discuss Bagley's work performance. When it was pointed out to Meagher that this did not seem possible because the counseling report was dated August 3, Meagher reluctantly acknowledged that the report had been prepared after the late July meeting. Meagher subsequently testified she first observed the August 3 counseling report on October 31, 1993, the day before she testified in this case, rather than on August 3, 1993, and testified she had no independent recollection of having observed it prior to October 31, 1993. In view of the above-described inconsistencies in Meagher's testimony and the fact that Van Baren testified that the August 3 meeting was between solely herself and Bagley and considering Meagher's poor demeanor when she testified, I am persuaded Meagher's testimony that she was present at the August 3 meeting and observed the August 3 counseling report being prepared by Van Baren was a fabrication.

Regarding ''1'' and ''3'' of the August 3 counseling report—employees were allegedly disputing the veracity of Bagley's disciplinary reports and Bagley was allegedly treating employees too harshly—Van Baren testified her basis for believing Bagley had engaged in this conduct was as follows: subsequent to July 21 Bagley's ''whole personality changed,'' and Bagley started to have ''a lot of inconsistencies in her stories,'' Bagley's writeups ''were not making sense, her complaints were becoming not always consistent with [her actions]. I had nurses . . . telling me they did not feel her behavior was appropriate and there just seemed to be a whole change in her personality that I cannot explain''; subsequent to July 21, in connection with the disciplinary reports Bagley prepared, Bagley ''never'' supplied the documentation needed to substantiate the allegations in the report; several of the nurses, including Charge Nurse Remy Hall, LVN Desire Abrams, CNAs Anissa Villar, Joanne Mejia, Lodring Ignacio, and Vicki McCauley, told Van Baren their ''concerns'' about Bagley; during the first week of August, Van Baren met with all of the p.m. shift employees to determine what their problems were and several of the employees, including Villar, Abrams, Hall, and McCauley told Van Baren ''they did not feel that Carol Bagley was fair with them,'' Villar specifically complained about a writeup she had received by Bagley, and others also complained about their writeups and problems related to Bagley; Bagley issued more writeups than were ''reasonably necessary,'' several of which Van Baren revoked including the ones issued in July to Abrams and Villar;[8] and, Bagley's harshness toward the employees was illustrated by her suggestion to Van Baren on July 22 that CNAs Llever, Baldoza, Mejia, and Ignacio all be terminated for having abandoned their work stations on July 21.

Regarding paragraph ''2'' of the August 3 counseling report—many employees complained that Bagley was making ''racial remarks''—Van Baren testified that she was informed by clerk Emily Martinez, and Charge Nurses Hall and Rosen, that on July 28 Hall, a charge nurse on the p.m. shift, had been assigned to work overtime on the night shift because a nurse on that shift failed to come to work and Bagley angrily yelled that ''the Filipinos get all of the overtime and she was tired of it,'' and Martinez, who is a Filipino, became especially upset by this remark. Bagley denied engaging in this conduct. She testified she complained to the clerk who did the scheduling that the persons who scheduled the overtime asked the same persons to work overtime and did not ask anyone else and Bagley felt that the overtime should be distributed equally among all of the employees. Bagley denied stating it was only the Filipinos who received the overtime or that she used words to that effect.

The testimony of Bagley, whose testimonial demeanor was good, was not denied; neither Martinez, Hall, or Rosen were called by Respondent to corroborate Van Baren's testimony that they had accused Bagley of making the racial remarks attributed to her by Van Baren or to testify that Bagley in fact engaged in this conduct. Rosen was not called by Respondent to corroborate Van Baren's testimony despite the fact that at the time of the hearing she was a member of Respondent's management, its assistant nursing director, who testified for Respondent concerning other matters. Under the circumstances, and in view of Bagley's good testimonial demeanor, I find she did not make the racial remark that Van Baren testified other employees attributed to her.

Bagley testified that on August 3 Van Baren did not speak to her about her work performance, that the August 3 meeting between herself and Van Baren never occurred, and that prior to the hearing in this case Bagley never knew about the August 3 counseling report.[9] She also testified Van Baren never spoke critically to her about her work performance and testified she never was counseled nor reprimanded for treating the employees she supervised too harshly. To the contrary, Bagley testified she was told by Meagher on more than one occasion not to bring to work things from her home for the employees and not to be so ''friendly'' with the employees.

Bagley testified that only one of the topics set forth in the August 3 counseling report's four numbered paragraphs was ever discussed with her by Van Baren. This, she testified, was the request that she not use her nickname while on duty. Bagley testified Van Baren telephoned her at work and asked

[8] Other than the two writeups issued to Abrams and Villar, Van Baren testified she was not able to recall any of the other writeups issued by Bagley that Van Baren revoked.

[9] There is no evidence or contention that Van Baren gave or even showed Bagley the August 3 counseling report.

that she not use her professional name while at work, explaining to Bagley that Administrator L. Shenker had asked that Bagley use her professional name rather than her nickname ''Pepper,'' and Bagley replied by telling Van Baren she would comply with Administrator Shenker's request.

I credit Bagley's above-described testimony and reject in its entirety Van Baren's testimony concerning the August 3 meeting between Van Baren and Bagley. In doing so I considered Bagley's good and Van Baren's poor testimonial demeanor. I received the impression from the way Van Baren spoke and the tone of her voice and the way she looked and acted while testifying, that she was not a sincere or conscientious witness, but was solely interested in tailoring her testimony to suit Respondent. I also considered the following additional factors: Meagher testified she was present at the August 3 meeting, whereas Van Baren testified Meagher was not here; and the inconsistencies contained in Meagher's testimony concerning the August 3 counseling report. The aforesaid inconsistencies, when viewed in the light of Meagher's poor testimonial demeanor, indicate that Meagher, like Van Baren, was not a sincere or conscientious witness, but Meagher's sole interest in attempting to corroborate Van Baren's testimony about the alleged August 3 meeting and counseling report was to assist Respondent regardless of the truth.

The above conclusion that the August 3 meeting did not occur and, as Bagley also testified, Bagley's work performance was never criticized by Van Baren, is further supported by the lack of merit and/or substance to almost all of the complaints set forth in the August 3 counseling report that Van Baren testified was the basis for the August 3 meeting.

As set forth above, Van Baren's testimony that portrays Bagley as a person who suddenly suffered a ''personality change'' and, who, as the result of the change in her personality, turned into a tyrant, who commenced to treat the employees under her supervision unfairly, unreasonably, and too harshly, is almost completely lacking in specificity. It consists almost entirely of Van Baren's vague and conclusionary testimony. This includes Van Baren's testimony about the employees' complaints about Bagley, which testimony, as described above, was worded for the most part in vague and conclusionary terms, completely lacking in specificity. Nor was Van Baren's testimony corroborated by the testimony of any of the employees who allegedly complained about Bagley's conduct—not one of them was called by Respondent to testify. In addition, other than the two writeups that Bagley wanted Van Baren to issue to employees Abrams and Villar, Van Baren was not able to identify any of the other supposedly numerous unwarranted disciplinary writeups that Bagley wanted Van Baren to issue to employees.[10] Lastly, Van Baren's testimony that on July 22 Bagley suggested that employees Llever, Mejia, Baldoza, and Ignacio be terminated for having abandoned their work stations on July 21 is false because, as I have found infra, this is not what occurred. Rather, Bagley merely gave those employees a verbal reprimand for their conduct and did not suggest to Van Baren that their employment be terminated.

In sum, the only evidence of substance presented by Respondent concerning paragraphs ''1'' and ''3'' of the August 3 counseling report, alleging Bagley was dishonest in disciplining employees and was treating employees too harshly, is that once when she submitted disciplinary notices to Van Baren that, after conducting her usual investigation, Van Baren concluded the recommended discipline was unwarranted.

Regarding paragraph ''2'' of the August 3 counseling report, alleging that many employees complained Bagley was making ''racial remarks,'' as I have found supra, Bagley did not make the isolated racial remark Van Baren testified other employees had attributed to her. Moreover, Van Baren's poor testimonial demeanor, when considered with the complete absence of any corroboration for Van Baren's testimony, leads me to reject Van Baren's testimony that such a complaint was ever communicated to her.

Regarding paragraph ''4'' of the August 3 counseling report, alleging Bagley was asked not to use her nickname ''Pepper'' while on duty, Bagley credibly testified Van Baren telephoned her at work and told her that Administrator L. Shenker had asked that she use her professional name, rather than her nickname, and Bagley responded by stating she intended to comply with Administrator L. Shenker's request. There is no evidence or contention that after Respondent's initial request that Bagley stop using her nickname while on duty, that Bagley continued to do so.

It is for the reasons set forth above that I find there is no merit or substance to any of the complaints alleged against Bagley in the August 3 report. This lends further support to my conclusion that the August 3 counseling meeting never occurred and that the August 3 counseling report was a part and parcel of Van Baren's fabrication of the August 3 meeting.

In so concluding, I considered the testimony of Administrator L. Shenker and Meagher that before Van Baren's August 3 meeting with Bagley that Van Baren discussed Bagley's unsatisfactory job performance with them. As was the case, however, with Van Baren's above testimony concerning her conversations with employees about Bagley's conduct, their testimony significantly omitted any specifics.

Other than Administrator L. Shenker's testimony that she told Van Baren she did not feel it was professional for Bagley to use her nickname over the public address system, when asked what was discussed about Bagley during the pre-August 3 meetings between herself and Van Baren, Administrator Shenker was only able to testify ''we discussed various comments that we had heard from others on the staff.'' Administrator Shenker failed to describe with any specificity

[10] As described in detail supra, under Respondent's customary disciplinary procedure, a shift supervisor who desires to issue a disciplinary notice to an employees has to first submit the notice to Van Baren who conducts her own independent investigation into the alleged misconduct before deciding whether to discipline the employees as recommended. In July, Bagley prepared disciplinary notices for issuance to p.m. shift employees Abrams and Villar recommending they be issued written reprimands based on the same conduct; the failure to turn a bedridden patient. On receipt of these disciplinary notices, Van Baren testified she investigated the matter by speaking to Bagley as well as to Abrams and Villar and by personally observing that the patient had not suffered a ''skin breakdown,'' which would have been the case if she had not been turned, and testified that based on her investigation she concluded that the patient, as claimed by Abrams and Villar, had in fact been turned, and because of this declined to follow Bagley's recommendation that they be disciplined.

whatsoever the substance of the ''various comments'' allegedly discussed.

Meagher testified she was unable to remember what was said about Bagley at the late July meeting she attended, and then belated testified the reason for her poor memory was she left the room before the meeting ended. When, however, counsel for Respondent showed Meagher a copy of the August 3 counseling report and asked if ''some'' of the issues discussed at the late July meeting were included in this report, Meagher testified, ''[Y]es.''

When viewed in the context of Meagher's prior incredible testimony concerning the August 3 meeting and the August 3 counseling report, Meagher's ''yes'' to counsel's leading question is in my view another fabrication designed to aid Respondent's case regardless of the truth. Moreover, I am convinced that this late-July meeting never occurred. Thus, Meagher testified it was a meeting held in late July in the office of M. and L. Shenker and was attended by both Van Baren and Meagher as well as by M. and L. Shenker. Meagher further testified that at this meeting Van Baren and Meagher gave to M. and L. Shenker the file of information they had complied about Bagley's work performance, after having conducted an investigation into Bagley's work performance. Neither M. nor L. Shenker or Van Baren corroborated Meagher's testimony about such a meeting. I am convinced that if such a significant meeting had occurred that either Van Baren or one of the Shenkers would have testified about it. I am convinced that the reason Meagher's testimony is uncorroborated is that the meeting never occurred. Meagher's fabrication of this meeting is simply another instance of her disregard for the truth.

On August 10 Bagley was ill at work and apparently had to leave work and go home. On the morning of August 11 she telephoned the facility and informed Van Baren she was feeling all right and intended to come to work that day. On her way to work, however, her motor vehicle broke down and between 4:30 and 5 p.m. she telephoned the facility and informed Van Baren of her car trouble, but told Van Baren she had been informed the car was safe to drive and she would come to work. Van Baren responded by advising Bagley not to come to work that day because Respondent had sufficient personnel to cover the shift and they would see her tomorrow.

The above description of Bagley's August 11 conversations with Van Baren is based on Bagley's testimony. Van Baren testified she spoke to Bagley over the telephone only once on August 11, when Bagley spoke to Staff Coordinator Ellenita Perez who informed Van Baren that Bagley was on the telephone asking if she was needed for work that day.[11] Van Baren testified she had Perez transfer the telephone call to her and asked Bagley how she was feeling, Bagley replied she felt fine and asked if she was needed for work that day, Van Baren told Bagley she did not understand Bagley's question because Bagley was scheduled to work that day and was the p.m. shift's supervisor, and Bagley replied she would come to work. Van Baren also testified that when she left the facility that day at 4:30 p.m. Bagley was not there and her position as p.m. shift supervisor had to be covered by another person, and later that evening Van Baren was informed by someone at the facility that Bagley had telephoned to say her car had broken down and because of that had not come to work. I rejected Van Baren's uncorroborated testimony and credited Bagley's testimony because of Bagley's good and Van Baren's poor testimonial demeanor.

On August 12 Van Baren telephoned Bagley at home and told her that her employment had been terminated. Bagley testified Van Baren told her she had been terminated because she would not work on weekends and that Respondent needed her to work on alternate weekends. Van Baren testified she did not inform Bagley she was being terminated for refusing to work weekends. Van Baren testified the reasons she gave to Bagley for her termination were as follows: the previous week Bagley had been counseled by Van Baren and the matters discussed then had not been ''resolved''; ''there was just too many problems and too many inconsistencies and . . . [Van Baren] felt she was not the right person for the job''; she was not coming to work and Respondent needed a p.m. shift supervisor who could be relied on to be at work; and the problems on the shift seemed to be getting worse. I credit Bagley's aforesaid testimony and reject Van Baren's because Bagley's testimonial demeanor was good, whereas Van Baren's was poor.

In discrediting Van Baren's testimony about her conversation with Bagley on August 12 notifying Bagley of the reasons for her termination, I considered Van Baren's further testimony that on August 12 at approximately the same time she notified Bagley she was terminated, Van Baren and Administrator Shenker prepared a termination slip for Bagley's termination stating the reasons for her discharge. This termination slip, Respondent's Exhibit 18, is written on one of Respondent's ''Employee disciplinary Notice'' forms and is undated and signed by Van Baren, but otherwise the contents of the termination slip were written by Administrator L. Shenker, who wrote:[12]

> We have been concerned over your performance as p.m. supervisor. Yesterday August 11, 1992 you called in and asked if you were needed after having called in also 1 day previously. As a supervisor, we find this a preposterous statement and then, you still did not show up for your shift—calling in 1-1/2 hours late leaving us without a supervisor which is a key position. In the recent past, you have not taken a station, when we did not have another nurse to fill that vacancy. We have found many inconsistencies in your various write-ups and employee rapport. Based on these instances and due to your short tenure we are terminating your services at CSM.

Administrator L. Shenker testified the decision to discharge Bagley was made by Van Baren and that Shenker concurred in the decision. When asked to state what was said by herself and Van Baren when they met and decided to terminate Bagley, Administrator Shenker testified she was not able to remember what was said other than that they discussed the decision to terminate Bagley and at that time their decision was recorded in writing in the form of a termination slip. Administrator Shenker further testified she was not able to remember the reason for Bagley's termination, unless she

[11] Perez was not called by Respondent to corroborate Van Baren's testimony.

[12] It is undisputed that the termination slip was never shown to or given to Bagley.

was able to read the termination slip, Respondent's Exhibit 18. It was only after having refreshed her memory by reading Respondent's Exhibit 18 that Administrator L. Shenker was able to testify about what was said between herself and Van Baren that led to the decision to discharge Bagley. In view of this lapse of memory on the part of Administrator L. Shenker, I pointed out that the record would show that in contrast to her lack of memory about the discussion concerning Bagley's discharge between herself and Van Baren, she had been able to remember what was said during her conversations connected with the discharge and discipline of employees, other than Bagley, and inquired if there was an explanation for this. In response Administrator Shenker testified:

> [B]ecause I was directly involved in the other ones. I wrote up those other things. . . . I was independently writing those things up along with discussions with [Van Baren], or . . . what other department heads would be involved at that particular time.

As Van Baren testified, however, the termination slip, Respondent's Exhibit 18, was written by Administrator L. Shenker and according to the testimony of Van Baren, from late July until the date of Bagley's termination, Administrator L. Shenker was in continuous communication with Van Baren about the alleged problems Van Baren was having with Bagley.

In other words, testimony presented by Respondent shows that Administrator L. Shenker was supposedly continuously and actively involved in the discussions that eventually resulted in Respondent's decision to discharge Bagley and, because of Shenker's involvement in this decision, it was Shenker, not Van Baren, who prepared Bagley's termination slip. Under the circumstances, it is unbelievable that Administrator L. Shenker had no independent recollection whatsoever of what was said during her August 12 meeting with Van Baren that allegedly resulted in the decision to discharge Bagley and to record the reasons for that decision in a termination slip that Administrator L. Shenker wrote out. It is also significant that Van Baren failed to testify about what took place at the August 12 meeting between herself and Administrator L. Shenker, which supposedly resulted in the preparation of Bagley's termination slip by Administrator L. Shenker and the telephone call to Bagley notifying Bagley of her termination.

Considering Administrator L. Shenker's poor testimonial demeanor when she testified she was unable to remember anything that was stated during her August 12 meeting with Van Baren; considering Administrator L. Shenker's poor testimonial demeanor when, after reading what she had written on Respondent's Exhibit 18, she then testified about her August 12 meeting with Van Baren; considering the incredible explanation advanced by Administrator L. Shenker to explain her inability to remember anything about her August 12 meeting with Van Baren that allegedly resulted in Respondent's decision to discharge Bagley; and, considering Van Baren's failure to testify about that meeting, I am of the opinion that Administrator L. Shenker's testimony about what was said by and between herself and Van Baren during that meeting was a fabrication and that Respondent's Exhibit 18 was also a fabrication written after the fact, in an effort to justify Bagley's discharge.

To sum up, for the reasons set forth above, I find that Bagley was not informed she was discharged for any of the reasons set forth in Respondent's Exhibit 18, but was notified by Van Baren on August 12 that she had been discharged for refusing to work weekends. It is for this reason and, for the other reasons set forth above, that I further find Respondent's Exhibit 18 to be an after-the-fact fabrication written in order to disguise the real reason for Bagley's discharge. This conclusion is buttressed by the fact that the record reveals that the allegations contained in Respondent's Exhibit 18 are without substance: On August 11 Bagley did not call in and ask if she was ''needed,'' but, after having dealt with a problem with her motor vehicle that had caused her to be late for work, she telephoned Van Baren, explained the situation, and offered to come to work, but was told it was not necessary because Respondent had sufficient personnel to cover the shift; Bagley did not, as alleged, refuse to accept an assignment to work as a nurse on a station when Respondent did not have another nurse to fill the vacancy, rather on the occasion in question, despite being ill, Bagley remained on duty as assigned;[13] and, as I have found previously in this decision, Respondent's allegation that there were ''many inconsistencies in [Bagley's] various writeups and employee rapport,'' is completely without substance.

b. *Discussion*

An employer violates Section 8(a)(1) of the Act by discharging a statutory supervisor for refusing to commit an unfair labor practice against statutory employees. *Country Boy Markets*, 283 NLRB 122 (1987), enfd. 869 F.2d 1397 (10th Cir. 1989); *Gerry's Cash Markets v. NLRB*, 602 F.2d 1021, 1023–1025 (1st Cir. 1979); *NLRB v. I. D. Lowe*, 406 F.2d 1033, 1034–1035 (6th Cir. 1969). The complaint alleges that Respondent's August 12 discharge of Bagley, a statutory supervisor, violated Section 8(a)(1) because it was motivated by Bagley's refusal to commit unfair labor practices against statutory employees. For the reasons set forth hereinafter this allegation has merit.[14]

On July 6, when Bagley began to work for Respondent as its p.m. shift supervisor, Assistant Director of Nurses Meagher, in the presence of Director of Nurses Van Baren, told Bagley that the Filipino employees employed on the p.m. shift were ''troublemakers'' who wanted to start a union,[15] and Van Baren stated Respondent did not need a union. Bagley replied she did not see any harm in a union.

[13] The pretextual nature of this allegation is further demonstrated by Van Baren's testimony that the alleged incident occurred on July 28 or 29, yet it was not one of the matters encompassed by Van Baren's August 3 counseling report, which Van Baren testified included all of the matters that she believed were sufficiently serious to require counseling.

[14] In determining whether the record as a whole establishes Respondent discharged Bagley because she refused to commit unfair labor practices, I have used the method of analysis for determining motivation in unlawful discrimination cases relied on by the Board in *Wright Line*, 251 NLRB 1083 (1980), which was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[15] A majority of the p.m. shift's employees were Filipinos.

During mid- and late-July, Meagher asked if Bagley overheard the employees speaking about the Union and, with respect to the employees' union activities, gave Bagley these instructions: if employees wore union buttons Bagley was to tell them to remove the buttons; if employees posted material concerning the Union in the breakroom, Bagley was to remove the posted materials; and, employees were not allowed to discuss the Union. Meagher also told Bagley that if employees discussed the Union or wore union buttons or posted union materials that Bagley should give their names to Meagher. Bagley responded to Meagher's above-described instructions by asking Meagher what was wrong with the Union, stating the employees did not speak about the Union in her presence, and by stating she thought it would be illegal for her to write up employees for discussing the Union because, she explained, employees could talk about whatever they wanted during their break periods.

At the end of July, Meagher asked if Bagley had followed Meagher's above-described instructions concerning the employees' union activity. Bagley responded by stating she had not followed Meagher's instructions because it was not Bagley's job to engage in that type of conduct and because she believed what Respondent wanted her to do was illegal.

Shortly after this, in early August, Meagher informed Bagley that Respondent needed her to work weekends as p.m. shift supervisor. Bagley refused to accept the change in her work schedule, explaining to Meagher she had been hired by Respondent with the understanding she would work only weekdays, because on weekends she worked for the local nurses registry service and did not wish to give up that weekend work. In fact, when Bagley was hired by Respondent as its p.m. shift supervisor, Respondent hired her for that position with the knowledge she was not available to work weekends.

On August 12, shortly after Bagley's refusal to work weekends, Van Baren notified Bagley that her employment had been terminated because she refused to work weekends. Admittedly, this was not the real reason for Bagley's discharge because, as Van Baren testified, Respondent had no need whatsoever for Bagley to supervise the p.m. shift on weekends.

In this proceeding, Van Baren testified the real reasons for Bagley's discharge had nothing whatsoever to do with her refusal to work weekends, but she was discharged because of the following: she had mistreated the employees she supervised; once she had refused to accept a job assignment; and, on August 11 had been absent from work. These reasons, however, like the reason Van Baren communicated to Bagley, were not the real ones for Bagley's discharge, but, as I have found supra, were after the fact fabrications advanced by Respondent to disguise the real reason for Bagley's termination.

The following circumstances, considered together, establish that a motivating factor for Respondent's decision to discharge Bagley was her refusal to obey Respondent's instruction to engage in conduct that would have interfered with the rank-and-file employees' statutory right to engage in union activity: the timing of Bagley's discharge—she was discharged shortly after she informed Respondent that because she questioned its legality she would not follow Respondent's instruction to prevent employees from discussing the Union and wearing union buttons in the facility, and to turn the names of those employees over to Respondent; if Bagley had obeyed those instructions her conduct would have interfered with the statutory rights of the employees to discuss the Union in such nonpatient care areas as the employees' breakroom and to wear union buttons on their uniform outside of immediate patient care areas, absent special circumstances not shown to exist in this case;[16] the reason that Respondent gave to Bagley for her discharge, her refusal to work weekends, was patently false and because of this Respondent during this proceeding advanced entirely different reasons for Bagley's discharge; and, these reasons, like the reason communicated to Bagley when she was discharged, were false reasons completely without substance.

The aforesaid factors, viewed in their totality, establish that a motivating factor for Respondent's decision to discharge Bagley was her refusal to commit unfair labor practices against statutory employees. I, therefore, conclude that the General Counsel has made a prima facie showing that Bagley was discharged for an unlawful reason.

The Respondent does not assert any business reason, other than the ones that I have found to be completely without substance, for discharging Bagley even if she had not refused to commit unfair labor practices against statutory employees. Therefore, it has not met its burden under *Wright Line*. I, therefore, find Respondent's discharge of Bagley on August 12 violated Section 8(a)(1) of the Act.

C. *The Alleged 8(a)(3) and (1) Violations*

1. The May 18 discharge of Nita Celarbo and suspension of Ethel Tarrosa

a. *The evidence*

Ethel Tarrosa and Nita Celarbo were employed by Respondent as CNAs on the p.m. shift; Celarbo since 1985 and Tarrosa since 1986. They are Filipinos whose native language is Tagalog.

Respondent's rules of conduct provide that ''speaking a language other than English while on duty . . . could result in some type of disciplinary action ranging from verbal and/or written warning to full reprimand and termination.'' During the period of time material to the discharge of Celarbo and the suspension of Tarrosa, if employees spoke Tagalog while on duty, Respondent's charge nurses or supervisors would normally only call the above rule to their attention and remind them not to speak Tagalog or, at the very most, would issue a counseling report to the offender. It was only after repeated violations of this rule that supervision would issue a disciplinary notice to the offender and, if, after receiving a disciplinary notice, the employee continued to engage in this conduct, the employee received only another disciplinary notice and was not suspended or discharged (Tr. 798–803).

[16] The record does not establish that Respondent permits its employees to post materials of a personal or nonwork related nature on the breakroom bulletin board, thus there is no showing that Respondent's instruction concerning the removal of posted union materials would discriminate against employees' union activity. Therefore, the removal of the union material posted by employees would not have violated the Act. See generally *Honeywell, Inc.*, 262 NLRB 1402 (1982).

On several occasions in May, prior to her May 18 suspension, Tarrosa, with other employees employed on the p.m. shift, discussed union representation. These conversations took place in the facility's parking lot and in the employees' breakroom.

On several different occasions, in May, prior to May 18, during the break period, Celarbo discussed the Union with other employees employed on the p.m. shift and once met with four or five of the p.m. shift employees in the facility's parking lot where they discussed the subject of union representation.[17]

Tarrosa's suspension

On the morning of May 18, Tarrosa, at Respondent's request, came to the facility, where she met with L. Shenker and Van Baren. L. Shenker, the Respondent's administrator, did all of the talking for Respondent.

Tarrosa was given or shown copies of two ''Employee Disciplinary Notices,'' General Counsel's Exhibits 5(a) and (b), which had been typed by p.m. Charge Nurse Pat Goel, and were dated May 18 and signed by Goel and Van Baren.

One of the notices, General Counsel's Exhibit 5(a), stated on May 8 Tarrosa was ''speaking foreign language while on duty, sitting on residents bed and watching TV'' and Goel had ''verbally counseled her on previous occasions.''

The other notice, General Counsel's Exhibit 5(b), stated on May 8 Tarrosa had engaged in ''insubordinate actions with regard to patient care'' and, in this regard, further stated Goel ''asked [Tarrosa] the status of a resident after a particular incident had occurred'' and Goel ''was given an answer of 'I don't know''' and when Goel questioned Tarrosa further, Tarrosa ''threw the resident's chart across the desk in my general direction.''

In the section of the above-described notices that provides for ''action taken,'' Van Baren had written Tarrosa was suspended without pay beginning on May 20 and ending on May 23.

L. Shenker advised Tarrosa that because of Tarrosa's misconduct she had almost been discharged and explained the reason why she had not been discharged was her father had been employed by Respondent for a long time, and also told Tarrosa that Nita Celarbo had already been discharged. L. Shenker stated she had been prepared to discharge all of Tarrosa's friends who spoke Tagalog, asked if Tarrosa wanted to be ''part of the solution or a part of the problem,'' and when Tarrosa answered she desired to be part of the solution, L. Shenker stated if she wanted to be a part of the solution to tell her friends not to speak Tagalog. Tarrosa responded by stating she and Celarbo had been laughing and speaking in Tagalog in a hallway, not in a patient's room, and that no patient had been present while they were engaged in that conduct. L. Shenker informed her that employees while in Respondent's facility must speak English.

L. Shenker asked Tarrosa nothing about the part of the disciplinary notice that alleged she had been ''sitting on residents bed and watching TV.''

Regarding the allegation that on May 8 Tarrosa had acted insubordinate toward Goel, Tarrosa told L. Shenker she did not throw a chart at Goel, as alleged, and gave the following explanation of what had occurred: Goel asked for the room number of patient Jones; Tarrosa replied she did not remember it and stated she could show Goel where the room was located; Goel left with the medication cart and a few minutes later Tarrosa, who had gotten Jones' medical chart, informed Goel she had the chart and, reading from the chart, gave Goel the room number of patient Jones; and Goel asked Tarrosa to return the chart back to the desk, which Tarrosa did.

The above description of Tarrosa's May 18 meeting with L. Shenker and Van Baren is based on Tarrosa's undenied testimony.

Tarrosa credibly testified that the description of what occurred between herself and Goel on May 8, as described by Tarrosa to L. Shenker on May 18, is what occurred.

Tarrosa also credibly testified that during her May 8 work shift she sat on an empty bed and watched TV and previously had engaged in this type of conduct, but Goel never spoke to her about it.

I reject Respondent's contention that on May 18, besides being suspended for 3 days, Tarrosa was also placed on probation. This contention is based on a memo from Van Baren to Respondent's payroll department dated May 19 stating Tarrosa had been placed on probation for 3 months. Van Baren also testified that during Tarrosa's May 18 meeting with L. Shenker and Van Baren that a document was given to Tarrosa stating she had been placed on probation. More specifically, Van Baren testified the document in question was not the above-described memo from Van Baren to the payroll department, but was in the form of a written disciplinary notice stating Tarrosa had been placed on probation because of her misconduct. Van Baren's testimony is contradicted, however, by the undisputed fact that the disciplinary notices issued to Tarrosa on May 18, supra, say nothing about her being placed on probation and, as I have found supra, nothing was mentioned at the May 18 meeting about Tarrosa being placed on probation. Considering these circumstances and Van Baren's poor testimonial demeanor, I find Tarrosa was not placed on probation and that the May 19 payroll department memo prepared by Van Baren was done so in an effort to bolster Respondent's case in this proceeding.[18]

Celarbo's discharge

On May 18 at approximately 9:30 a.m. Celarbo received a telephone call at home from Respondent's staff coordinator, Ellenita Perez, who told her not to come to work because her name had been removed from the work schedule and if she wanted to know the reason to speak to Van Baren. Celarbo immediately telephoned Respondent's director of staff development, Boeger, and asked why her name was removed from the work schedule. Boeger responded by advising her to come to the facility and talk to M. and L. Shenker.

[17] Celarbo testified that prior to her May 18 discharge she discussed the Union with other employees at the home of employee Guzman. It is clear from the record as a whole that this meeting occurred on May 23.

[18] Respondent offered no evidence to corroborate Van Baren's testimony that Tarrosa was placed on probation as well as being suspended for 3 days. In addition, no one corroborated Van Baren's testimony that she submitted the above memo to the payroll department on or about May 19.

Celarbo stated she felt she had not done anything wrong and was too upset to speak to the Shenkers.

Celarbo then, on May 18, telephoned Van Baren and asked whether she had done something wrong because, she told Van Baren, Perez had removed her name from the work schedule. Van Baren answered by stating that ''somebody'' had reported Celarbo had engaged in the following conduct: speaking Tagalog; sitting on a patient's bed; and had been insubordinate. Van Baren told Celarbo to come to the facility to pick up her paycheck because, Van Baren stated, she had been terminated.

The above description of Celarbo's May 18 conversations with Perez, Boeger, and Van Baren is based on Celarbo's testimony. It was undenied and uncontroverted except by Van Baren, in one respect. Van Baren, who was not questioned about her May 18 telephone conversation with Celarbo, while testifying about the reasons for Celarbo's termination, stated that one of the reasons Van Baren decided to terminate Celarbo was Celarbo told Van Baren she was not going to come to the facility and talk to Van Baren about the allegations of misconduct attributed to her. Celarbo denied Van Baren asked her to come to the facility to speak to her or to discuss the reasons for her termination. I credited Celarbo's testimony because her testimonial demeanor was good, whereas Van Baren's was poor.

Shortly after Van Baren on May 18 told Celarbo she was discharged, Celarbo wrote Van Baren requesting something in writing to explain the reasons for her termination. In response, on or about May 25, Celarbo received an undated letter, signed by Van Baren, which stated, in pertinent part, ''[i]n reference to your termination on May 18, 1992. As you were unable to come in and discuss the reasons for your termination in person as requested I had to speak with you on the phone and gave you those reasons.''

Celarbo credibly testified that during the course of her 7 years in Respondent's employ she occasionally had sat on patients' beds while at work and was never warned about engaging in this type of conduct.

Celarbo credibly testified that neither Charge Nurse Goel or Van Baren ever spoke to her about speaking Tagalog while at work. It is undisputed, however, that in the spring of 1992 Karen Meagher, who at the time was a supervising nurse, told a group of nurses including Celarbo not to speak Tagalog while on duty because it upset the patients. Celarbo and the nurses had been speaking Tagalog. Meagher reminded them it was a facility policy that everyone speak English when on duty whether they were in a hallway or in a patient's room. In response, Celarbo told Meagher she realized this but had just forgotten and that sometimes it was difficult for her to get an idea across in English.

Respondent's reasons for discharging Celarbo and suspending Tarrosa

Respondent's director of nurses, Van Baren, was the only member of management or of supervision to testify about Respondent's decision to discharge Celarbo and suspend Tarrosa or to testify about the circumstances that resulted in those decisions. A summary and an evaluation of her testimony is set forth below.

General Counsel's Exhibit 4 is, in pertinent part, a typed letter dated May 8, addressed ''To Whom it may concern: D.O.N. [referring to Director of Nurses].'' The letter that was captioned ''Subject: Collective Insubordination'' is signed by Pat Goel, who at the time was a charge nurse on the p.m. shift. It reads as follows:

> This letter is intended to address concerns regarding insubordination thereby hindering patient safety and quality of care. My concerns are as follows:
>
> 1. Frequently speak Filipino in my presence & or others.
> 2. Repeatedly answer me with ''I don't Know,'' when asked about patients' status and or change
> 3. Observed sitting on patients' bedroom and watching television.
> 4. Inappropriate placement of patients' restraints.
> 5. Coerce other staff to be uncooperative.
> 6. Personal harassment
> 7. Asking me sarcastically at the end of the shift, ''Did we give you a hard time?''
> 8. They accuse me of getting nervous and panic whenever the patient falls down and afterwards they laugh and giggle.
>
> Continued unruly behaviors as cited above will result in endangerment of quality of patient care and safety, possible loss of license; possible litigation; and discord among staff in work environment.
>
> **This is regarding Nita Cilarbo [sic] (CNA).*

Van Baren testified she received this letter from Goel on May 12 and the allegations set forth in the letter pertain to Tarrosa as well as Celarbo. At another point, however, Van Baren testified that on May 12 she received another letter from Goel that was specifically concerned with the misconduct engaged in by Tarrosa and testified this second letter contained ''pretty much the same information'' as General Counsel's Exhibit 4. Respondent did not produce this alleged second letter.

Regarding the two disciplinary notices issued to Tarrosa on May 18, when she met with Van Baren and L. Shenker, General Counsel's Exhibits 5(a) and (b), Van Baren testified, ''I asked [Goel] to do this [a reference to the allegations of misconduct set forth in Goel's May 8 letter] on the proper form.'' It is clear it was not until May 18 that Van Baren supposedly instructed Goel to prepare these disciplinary notices inasmuch as they are dated May 18. Van Baren did not explain why, if Goel attributed the allegations of misconduct set forth in her May 18 letter to both Tarrosa and Celarbo, the disciplinary notices prepared by Goel that were issued to Tarrosa on May 18 failed to include the majority of the allegations set forth in Goel's letter.

Van Baren testified Goel's May 8 letters concerning Tarrosa's and Celarbo's misconduct referred not to just incidents that occurred on May 8, but to a whole series of acts of misconduct that occurred prior to May 8 over a period of several months and what occurred on May 8 was the ''final straw'' for Goel. This testimony is highly suspect because it is undisputed that prior to Goel's May 8 letters to Van Baren that Goel had never previously complained about either Tarrosa or Celarbo to Van Baren. Nor had anyone else made such complaints to Van Baren. I find it difficult to believe that if either Tarrosa or Celarbo or both of them, prior to May 8, had been engaging in the type of serious misconducts set forth in Goel's May 8 letter, that Goel would not have told Van Baren they were engaging in this conduct. Accord-

ing to Van Baren's testimony, however, the only complaints she received prior to May 12 involved the conduct of the p.m. shift in general without any mention of the names of the employees involved. Also, when asked if during the period she was receiving these complaints about the p.m. shift she had ever spoken to Tarrosa or Celarbo or issued them written disciplinary notices, Van Baren testified she had spoken to them, but significantly failed to testify further about these alleged conversations.

On the receipt of Goel's letters on May 12, Van Baren testified she immediately conducted an investigation to determine whether the allegations set forth in the letters were true insofar as they attributed the alleged misconduct to Celarbo and Tarrosa. She testified the investigation consisted of her speaking to the following persons: Charge Nurse Goel; the p.m. shift supervisor; and two nursing assistants. Van Baren testified she was unable to remember the name of the p.m. shift supervisor who she spoke to and was also unable to remember the names of the two nursing assistants. Nor did she testify about her conversations with these unidentified persons.

Van Baren, at different times during her testimony, testified about remarks Goel made when Van Baren spoke to Goel about the letters she had received from Goel on May 12. Goel's remarks may be summarized as follows: Celarbo was an employee that Goel had been having difficulties with over a period of time; on May 8 and on occasions prior to May 8 Celarbo and Tarrosa had been sitting on patients' beds watching television instead of caring for patients; on May 8 and on occasions prior to May 8 Tarrosa and Celarbo had refused to obey Goel's orders; on May 8 and on repeated occasions prior to May 8 Celarbo had repeatedly answered Goel with the comment ''I don't know'' when asked about patients' status or change; on May 8 Tarrosa had used a restraint on a patient even though a physician had not authorized the use of the restraint;[19] since January 1990 Tarrosa had been coercing other staff to be uncooperative and on May 8 had again engaged in this conduct;[20] and Goel felt she was being harassed and was ready to quit her job. This was the extent of Van Baren's testimony concerning what was said by either Van Baren and Goel when Van Baren spoke to Goel in connection with Van Baren's investigation into the allegations of misconduct supposedly attributed by Goel to Tarrosa and Celarbo.

Van Baren testified that after concluding her investigation a decision was made by herself and ''administration'' to discharge Celarbo because her investigation had found Celarbo to be guilty of gross negligence and insubordination; by gross negligence, Van Baren testified she was referring to those allegations in the May 8 letters that alleged ''inappropriate placement of patients' restraints'' and ''sitting on patient's bedroom and watching television.'' Van Baren also testified Celarbo was terminated because Goel's May 8 letter showed she was not doing her job and because she refused to come to the facility on May 18 and speak to Van Baren about the allegations of misconduct set forth in Goel's letter.[21]

Van Baren testified Tarrosa was suspended, rather than discharged, because, unlike Celarbo, she came to the facility to discuss with Van Baren the matter of her discipline and because she decided to give Tarrosa another chance because her parents also worked for Respondent.

I reject in its entirety Van Baren's above testimony set forth in this section because: her testimonial demeanor was poor—the way she spoke, the tone of her voice and the way she looked and acted while testifying led me to believe her sole interest was to tailor her testimony to suit Respondent's case regardless of the truth; there is no corroboration whatsoever for any part of her testimony—her testimony concerning Respondent's decision to discharge Celarbo and suspend Tarrosa and the circumstances that led up to and resulted in those decisions is based on information allegedly received by Van Baren from Charge Nurse Goel and the p.m. shift supervisor whose name Van Baren supposedly does not remember and from two nurses aides whose names she also supposedly cannot remember, none of whom were called on to corroborate her testimony; although Van Baren testified she investigated the allegations of misconduct set forth in Goel's May 8 letters by speaking not only to Goel but to the unidentified p.m. shift supervisor and the unidentified nurses assistants, Van Baren failed to testify about the content of those alleged conversations and, as set forth above, her testimony concerning her conversation with Goel is completely lacking in specificity and has Goel simply parroting the conclusionary allegations set forth in her May 8 letter; Respondent's unexplained failure to produce the letter from Goel charging Tarrosa with the same type of misconduct as alleged against Celarbo in Goel's May 8 letter, General Counsel's Exhibit 4, warrants the inference that the letter never existed and Van Baren's testimony about that letter was a fabrication designed to support her further testimony that Goel had alleged that Tarrosa, as well as Celarbo, was responsible for the misconduct set forth by Goel in General Counsel's Exhibit 4, even though that exhibit on its face states, ''This is regarding Nita Cilarbo [sic]'' and does not mention Tarrosa's name; and Van Baren's testimony that she was informed by Goel that Tarrosa and Celarbo for several months prior to May 8 had been engaging in the type of serious misconduct set forth in Goel's May 8 letter does not ring true because despite the serious nature of the misconduct Goel had never previously recommended that either Tarrosa or Celarbo be disciplined or otherwise complained to Van Baren about their misconduct.[22] These are the reasons that have led me to reject in

[19] Van Baren testified she could not recall either the name of the patient involved or the type of restraint involved. Tarrosa credibly testified she never placed a restraint on a patient that had not been authorized by a doctor's order or that Goel ever spoke to her about engaging in this type of conduct.

[20] When asked how Tarrosa had coerced other staff to be uncooperative, Van Baren testified, ''[Y]ou'd have to ask her that, I can't give you a specific,'' and when the question was repeated, testified, ''I don't recall at this moment.''

[21] As I have found supra, Van Baren did not ask Celarbo to come to the facility and speak to Van Baren about the allegations set forth in Goel's letter.

[22] I reject Van Baren's testimony that prior to May 8 she had spoken to both Tarrosa and Celarbo about the complaints she was receiving about the conduct of the p.m. shift generally. Van Baren did not testify about these conversations, when they occurred or what was said, and failed to explain why she chose Tarrosa and Celarbo from among the several employees employed on the p.m. shift to speak to about the fact that the shift in general had supposedly been the subject of complaints. It is for these reasons, plus Van Baren's poor testimonial demeanor, which has led me to reject her testimony

its entirety Van Baren's testimony concerning Respondent's decision to discharge Celarbo and suspend Tarrosa and the circumstances that prompted Respondent to reach those decisions.

b. *Discussion*

The allegations that on May 18 Respondent discharged Celarbo and suspended Tarrosa because of their union sympathies and activities lack merit because, for the reasons below, the whole record fails to establish Respondent knew or believed these employees were union sympathizers or activists. I, therefore, shall recommend the dismissal of these allegations.

As I have found supra, Celarbo and Tarrosa in May, prior to May 18, on different occasions in the facility's parking lot and breakroom, participated in p.m. shift employees' discussions about union representation. There is no evidence, however, of what was said during these discussions; whether Celarbo or Tarrosa were particularly outspoken in favor of union representation or whether they were just inquiring about the benefits of union representation or were merely silent participants. The Union during this period of time had apparently not commenced its campaign to organize the employees, for it was not until May 23 that the Union held its first organizational meeting for the p.m. shift employees. Thus, it is not surprising there is no direct evidence of Respondent's knowledge that its p.m. shift employees, including Celarbo and Tarrosa, were engaged in discussions about union representation as early as May 18. I recognize, as I have found supra, that in July Respondent requested its p.m. shift supervisor and two of its p.m. shift employees to spy for Respondent on employees' union activity. There is no evidence, however, that as early as May 18, prior to the commencement of the Union's organization campaign, Respondent was engaged in this type of conduct.

Not only is there a lack of evidence to establish that Respondent on May 18 knew employees Celarbo and Tarrosa had been involved in discussions with other employees about union representation, there is also a lack of evidence that, as early as May 18, Respondent knew that its employees were discussing union representation. And, as I have noted supra, this is not surprising because the Union's organizational campaign apparently did not begin until May 23, when the first organizational meeting was held by the Union at the home of one of the p.m. shift employees.

As suggested by counsel for the General Counsel, I have considered that even in the absence of direct evidence of employer knowledge of an employee's union sympathy or activity, it is sometimes appropriate to conclude that the circumstances surrounding an employee's discharge or suspension are sufficient to create an inference that the employer knew about the employee's union sympathy or activity. Assuming in the instant case that the record as a whole establishes the reasons advanced by Respondent for Celarbo's discharge and Tarrosa's suspension were false and/or pretextual, this circumstance, even when considered with Respondent's evident extreme antiunion animus and with Respondent's surreptitious efforts in July to learn the names of the employees who favored union representation, it would still not warrant the inference that as early as May 18, prior to the start of the Union's organizational campaign, Respondent knew or believed that Celarbo and Tarrosa were union sympathizers or activists. It would be inappropriate for me to draw this inference because of the following: the extremely limited nature of Celarbo's and Tarrosa's union activity; the lack of evidence that in their discussion about union representation with other employees that either one of them indicated they favored union representation; and, most significantly, the lack of evidence to establish that as early as May 18 Respondent knew that any of its employees were discussing the subject of union representation.

2. The July 1 discharge of Annie Mariano

a. *The evidence*

Mariano was employed by Respondent as a CNA for almost 7 years—August 7, 1985, to July 1—on its p.m. shift.

In an effort to secure union representation for herself and the other nurses employed by Respondent, on or about May 9 Mariano and her sister, Caridad Guzman, also employed on Respondent's p.m. shift as a CNA, met with Union Representative Griffith at Guzman's home. Subsequently, on May 23, a union organizational meeting was held at Guzman's home attended by approximately 10 to 15 employees including Mariano and Union Representative Griffith. Mariano solicited several employees to attend the meeting.

Mariano's discharge

On July 30, Mariano was assigned to station 2 under the supervision of P.M.-Shift Supervisor Eva Suitos. Mariano was responsible for the care of seven to eight patients, one of whom, Sorrentino, had been admitted to the facility that day.

CNAs are required to assist not just the patients specifically assigned to their care. If a call light is on outside of the room of a patient assigned to a CNA who is not in the area, a CNA who is in the area must attend to the patient's immediate needs.[23]

On June 30, at approximately 4:45 p.m., Mariano, following her daily practice, transported the several patients assigned to her care to the facility's dining room for dinner. She placed them in wheelchairs (geri-chairs) and one by one pushed them from station 2 to the dining room. When she entered the dining room with a patient, she prepared the patient for dinner, i.e., placed a bib on the patient.

As I have indicated supra, Mariano testified her daily practice, like the other CNAs, was to wheel her patients to the dining room for their dinner. Director of Nurses Van Baren and Assistant Director of Nurses Meagher denied this was a part of Mariano's duties. They testified that because Mariano was assigned to care for Medicare patients, she was not allowed to leave her station. Neither Van Baren or Meagher explained how the Medicare patients assigned to Mariano's care were supposed to get to the dining room for dinner each day. Because the testimonial demeanor of Van Baren and Meagher was generally poor, whereas Mariano's testimonial demeanor was good, I have credited Mariano's testimony. Moreover, if, in leaving her station to wheel her patients to

that prior to May 8 she had spoken to Tarrosa and Celarbo about their conduct.

[23] When patients need assistance they push a button and a light outside of their room goes on.

the dining room, Mariano had violated a rule requiring her to remain at the station, it is incredible that Shift Supervisor Eva Suitos did not counsel or discipline Mariano for violating this rule, but instead, as described infra, counseled her for having left the station to take her patients to the dining room when there was no other CNA at the station to answer the patients' call lights.

On June 30, while Mariano was in the main dining room attending to one of the patients she had wheeled to the dining room, Shift Supervisor Suitos approached her and stated she had been looking for Mariano because Sorrentino's call light was on and Mariano had been paged a couple of times over the public address system to attend to this patient. Mariano replied she had not heard the page and would go immediately to the patient's room.

Mariano, walking a little faster than usual, went immediately to Sorrentino's room and took care of the patient's needs. In the room, when Mariano arrived, was another CNA, Kumar Biro, who told Mariano he had answered the patient's call light, but the patient's son stopped him from assisting the patient because he said his mother wanted a female CNA to assist her.

Subsequently, on June 30, at approximately 11 p.m., Suitos handed Mariano an ''Employee Counseling Report,'' signed by Suitos, which stated the reason for the counseling was Mariano, who was assigned Medicare patients, left her station when no one was there to answer her patients' call lights and Mariano had failed to answer a call over the paging system for the CNA assigned to Sorrentino. The report further stated Mariano informed Suitos that Mariano had not heard the page. Suitos concluded the report by stating Mariano should be more alert and receptive to patients' needs and to answer call lights on time.

When shown this counseling report by Suitos, Mariano told her that the report was inaccurate because another CNA, ''Clarita,'' had been on duty at station 2 during the period Mariano was away from the station transporting her patients to the dining room.

On July 1, according to Meagher's testimony, Meagher and Van Baren decided to terminate Mariano's employment and, consistent with company policy, removed Mariano's timecard from the timecard rack and directed the payroll department to prepare Mariano's final paycheck (Tr. 1379).

Subsequently, on July 1, when Mariano came to work at 2:45 p.m., she discovered her timecard had been removed and that word had been left for her to go to Meagher's office. When Mariano entered the office she asked Meagher what was the matter. Meagher responded by asking her to tell her about ''last night.'' Mariano stated she had been told she had been paged twice, that she had not heard the page, and as soon as she was told she had been paged she immediately went to her station. Meagher informed Mariano that Meagher and Van Baren had reviewed Mariano's personnel file and decided to terminate her employment. Meagher then showed Mariano a one paragraph typed document, undated, with Meagher's name typed at the bottom, which read as follows:

> Annie Mariano has had three separate incidents involving Resident Neglect dating 8–13–86, 2–3–88, and 6–30–92. After reviewing Annie's personnel file, and finding numerous other infractions against facility policies, Administration has come to the decision to Terminate.

On learning she had been terminated and having read the above document, Mariano became very upset. She told Meagher she felt she deserved another chance and begged Meagher to rescind her termination. When Meagher stated she would not rescind the termination, Mariano lost her composure and started to cry and when Meagher left the office Mariano followed her and yelled that Meagher should go to hell and tried to punch Meagher in the face, but was prevented from doing so by another nurse who pulled her away from Meagher, and Mariano then left the facility.[24]

Mariano credibly testified she had no knowledge of the allegations in the termination slip shown to her by Meagher on July 1, which attributed incidents of patient neglect to Mariano in 1986 and 1988. Respondent presented no disciplinary or counseling reports or other documentation memorializing such allegations, nor did Respondent present any testimonial evidence to substantiate those allegations and, as described in detail infra, during the hearing when it gave its reasons for terminating Mariano, Respondent did not mention the alleged 1986 or 1988 allegations of patient neglect or otherwise rely on them as contributing to Mariano's discharge. In view of all of the above circumstances, I find that the 1986 and 1988 allegations of patient neglect attributed by Respondent to Mariano in the July 1 termination notice, never took place and Respondent had no reason to believe they took place.

Respondent's reasons for discharging Mariano

Respondent Director of Nurses Van Baren and Assistant Director of Nurses Meagher were the only persons called by Respondent to testify about Respondent's decision to discharge Mariano and the circumstances that resulted in that decision. A summary and evaluation of their testimony is set forth below.

During the week of July 1, Van Baren was present only infrequently at Respondent's facility. She was constantly at Kaiser Hospital visiting her husband who recently had undergone major surgery. During this period she was present at Respondent's facility for only short intervals to handle matters that needed her immediate attention. It was not until the week of July 6 that Van Baren was able to devote her full time to her duties as director of nurses.

Meagher's testimony

Meagher testified that on July 1 at the daily 9 a.m. meeting of department heads, Jane Boyle, Respondent's social service director, told Meagher that the previous evening a patient's family became very upset because of the lack of attention their mother had received and that Boyle herself had personally witnessed what had taken place. Meagher testified Boyle stated she had witnessed the following: the patient, a female, needed to use the toilet; her son sought assistance for her; a CNA was paged but failed to come; a male CNA assigned to the station attempted to assist the patient, who re-

[24] The above description of Mariano's July 1 termination interview is based on a composite of Mariano's and Meagher's testimony. They did not contradict one another when they testified about this meeting.

fused his offer of assistance stating she wanted a female CNA to assist her; Boyle asked P.M. Shift Supervisor Suitos to get a female CNA; Mariano was paged; and, it was at least 20 minutes before Mariano came to assist the patient.

Meagher testified that immediately after the 9 a.m. meeting of the department heads, she ''beeped'' Van Baren, who was at the Kaiser Hospital visiting her husband, that Van Baren promptly telephoned Meagher, who told her about the above incident as described by Boyle, and Van Baren instructed Meagher to review Mariano's personnel file.

Meagher testified she reviewed the materials in Mariano's personnel file and a couple of hours after her initial telephone conversation with Van Baren and met with Van Baren, in Van Baren's office, where they discussed the matter. She testified this meeting took place at approximately lunchtime and during the meeting it was jointly decided by Van Baren and Meagher to discharge Mariano.

Meagher testified the documents in Mariano's personnel file, which Meagher and Van Baren reviewed that resulted in their joint decision to discharge Mariano, were as follows: ''Employee Counseling Reports'' dated April 5, 1991, March 4, 1992, and June 30, 1992, signed respectively by Shift Supervisors Sharon Cissel, Thelma Smith, and Eva Suitos; and an ''Employee Disciplinary Notice'' dated July 1, 1992, signed by Dietary and Kitchen Supervisor Yvonne Senn.

The employee counseling report dated April 5, 1991, signed by Shift Supervisor Cissel states the reason for the counseling was Mariano had been ''speaking a language other than English while on duty'' in violation of Respondent's rules of conduct that provide that employees must not speak a language other than English while on duty. In the bottom section of the report, which provides for the supervisor to comment about the situation 1 week after the counseling, Cissel had written that the ''situation is improving.''

The employee counseling report dated March 4, 1992, signed by Shift Supervisor Smith states the reason for the counseling was Mariano broke a glass in anger because she was upset with her coworkers, and that even though no residents were present, Mariano ''understands that this is not acceptable'' and felt sorry about the incident and promised to refrain from any further display of this type and apologized to the charge nurse whose station was involved. In the bottom section of the report, which provides for the supervisor to comment about the situation 1 week after the counseling, Smith wrote that the ''situation is resolved.''

The employee counseling report dated June 30, 1992, signed by Shift Supervisor Suitos which, as found supra, was shown to Mariano by Suitos on June 30, states the reason for the counseling was Mariano, who was assigned to the Medicare patients, left her station when no one was there to answer her patients' call lights and that when Mariano was paged to attend to patient Sorrentino, she failed to answer the page. The report further states Mariano explained to Suitos she had not heard the page. The report concluded with the statement that Mariano should be more alert and receptive to patients' needs and to answer call lights on time.

The employee disciplinary notice dated July 1, 1992, purportedly signed by Dietary and Kitchen Supervisor Senn states on June 30 Mariano ''was paged twice and took her time getting there.'' Attached to the notice is a note purportedly signed by Senn stating Senn had gone to station 2 for information about a new resident, Sorrentino, that the resident's son told Senn there was no one there to help his mother go to the toilet, Senn asked someone to page for Mariano, Mariano was paged twice, CNA Kumar Biro offered to assist the patient but his offer was refused by the patient because she wanted a female CNA to help her, Senn observed Mariano walking toward the patient's room ''very slowly,'' and the patient's son was very upset saying he could crawl faster than Mariano could walk.

Senn, who is still employed by Respondent, was not called by Respondent to testify about the preparation of the above disciplinary notice and attachment or about the events of June 30 set forth in the attachment. Mariano credibly testified that on June 30 when she approached patient Sorrentino's room that Senn was not in the area. Also, according to Meagher's above testimony, at the July 1 department head meeting that Senn, as one of Respondent's department heads, presumably attended, it was Social Service Director Boyle, not Senn, who supplied the information about Mariano's alleged improper conduct. Meagher did not explain why it was Senn, rather than Boyle, who prepared a disciplinary notice for Mariano's personnel file. Nor did Meagher testify how the disciplinary notice came to be placed in Mariano's personnel file and her testimony that it was in the file on July 1 is uncorroborated. In view of her poor testimonial demeanor and the aforesaid considerations, I have serious doubts that this document existed on July 1 or, as stated in the attachment to the notice, that Senn was actually present at patient Sorrentino's room when the events material to this case occurred.

Van Baren's testimony

Van Baren testified that during the morning of July 1, while visiting her husband at Kaiser Hospital, she spoke to Meagher, by telephone, who informed her there had been a problem involving Mariano the previous day on the p.m. shift, that Meagher read to Van Baren what P.M. Shift Supervisor Suitos had stated in her June 30 counseling report and told Van Baren that Dietary and Kitchen Supervisor Senn had been present when the incident occurred. Van Baren testified she responded by instructing Meagher to speak to both Suitos and Senn and to review Mariano's personnel file and after she had gotten all of the above information to contact Van Baren and they would discuss the matter further.

Van Baren testified that later on July 1, she spoke a second time to Meagher, by telephone from Kaiser Hospital, at which time Meagher told her she had been unable to speak to Suitos, reviewed the contents of Mariano's personnel file with Van Baren, again read to Van Baren Suitos' June 30 counseling report and reported what Dietary Supervisor Senn had reported.[25] This conversation ended, according to Van Baren, with Van Baren informing Meagher that Van Baren was ''leaning towards'' terminating Mariano, but Meagher should interview Mariano and at that time Meagher should make the final decision whether or not to terminate Mariano based on Mariano's ''attitude'' (Tr. 95). Van Baren later inconsistently testified, however, that as a result of the infor-

[25] Regarding the contents of Mariano's personnel file read to her by Meagher, Van Baren was only able to remember, so she testified, that within the past month or two Mariano had thrown a glass at a coworker.

mation she received from Meagher in this second telephone conversation, Van Baren decided at that time to terminate Mariano, unless during Meagher's interview of Mariano, that Mariano could satisfactorily justify her June 30 conduct.

When asked what Mariano had done on June 30, Van Baren testified that Van Baren had been told, presumably during her conversations with Meagher, that Mariano had engaged in the following conduct: ''Ms. Mariano was assigned to the Medicare Unit. She was off the Unit without permission. She did not respond to a patient needing assistance. And when asked to respond, she argued about it in front of the patient and the patient's family.'' (Tr. 90).

Van Baren also testified she had a third telephone conversation on July 1 about Mariano with Meagher, during which Meagher reported what had occurred during Meagher's July 1 interview with Mariano. Van Baren testified Meagher told her that when Meagher started to speak to Mariano that Mariano became very abusive and screamed and yelled at Meagher and that it was because of this conduct that Meagher just went ahead with the termination.

I reject in its entirety Van Baren's and Meagher's above testimony concerning the reasons for Respondent's decision to discharge Mariano and their conversations that led up to the decision. I was persuaded to reject their testimony and to conclude that the reasons they advanced to justify Mariano's discharge were false and pretextual, by these considerations: Van Baren's and Meagher's poor testimonial demeanor; the inconsistencies, contradictions, and improbabilities in their testimony; their failure to follow Respondent's progressive disciplinary procedure; the reasons they advanced at the hearing for Mariano's discharge differed significantly from the reasons that Meagher gave to Mariano when she notified Mariano of her discharge; and, they rushed to discharge Mariano without even speaking to Mariano or to Mariano's immediate supervisor, who had not recommended that Mariano be disciplined for the incident that supposedly triggered her discharge.

Van Baren's and Meagher's testimonial demeanor—the way they spoke, the tone of their voices, and the way they looked and acted while testifying about Mariano's discharge—led me to conclude they were not interested in truthfully recalling the events they were testifying about, but were interested only in tailoring their testimony to suit Respondent's case.

Van Baren and Meagher contradicted each other in the following significant respects: Van Baren testified the decision to discharge Mariano was made during a telephone conversation between herself and Meagher, whereas Meagher testified it was made during a meeting between Meagher and Van Baren in Van Baren's office, where presumably Van Baren had the opportunity to review the contents of Mariano's personnel file; Meagher testified that during this meeting in Van Baren's office, Van Baren and Meagher jointly decided to discharge Mariano, whereas Van Baren testified the decision was made solely by Van Baren and it was only a tentative decision subject to being changed by Meagher depending on the outcome of Meagher's interview with Mariano;[26] Van Baren testified Meagher told her that Meagher had gone ahead with Mariano's termination because when Meagher, on July 1, started to speak with Mariano, that Mariano became very abusive and screamed and yelled at Meagher, whereas Meagher testified Mariano lost her composure and became abusive only after Meagher had told Mariano that Meagher and Van Baren had decided to terminate her after reviewing her personnel file; and, in deciding to terminate Mariano, Van Baren testified she relied in part on Meagher's statement that Mariano's personnel file showed she had recently thrown a glass at a coworker, whereas the record shows the information contained in the March 4 counseling report issued by Supervisor Suitos, which information Meagher testified she communicated to Van Baren, does not expressly or by implication indicate Meagher had thrown a glass at a coworker, but merely states Mariano ''broke a glass at station 3 in anger.''

Neither Van Baren nor Meagher explained why, on July 1, when Meagher notified Mariano of her termination, she gave Mariano a substantially different reason for the discharge than was advanced by Van Baren and Meagher during the hearing. As described supra, on July 1, Meagher, in writing, notified Mariano that Respondent's decision to discharge her was motivated in significant part by the fact that ''Mariano has had three separate incidents involving Resident neglect, dated 8–13–86, 2–3–88, and 6–30–92.'' In testifying about the reason for Respondent's decision to discharge Mariano, however, neither Van Baren nor Meagher mentioned the alleged August 13, 1986, or February 3, 1988 incidents of resident neglect attributed to Mariano in the notice of termination. Respondent offered no explanation why these allegations were relied on in Mariano's termination notice, but were not mentioned by either Van Baren or Meagher when they testified about the reason for Mariano's termination. The reason for Respondent's failure to offer an explanation for this significant omission in Meagher's and Van Baren's testimony is that, as I have found supra, the 1986 and 1988 allegations of resident neglect attributed to Mariano in her termination notice never took place and Respondent had no reason to believe they took place.

In terminating Mariano, Van Baren and Meagher failed to follow Respondent's usual progressive disciplinary procedure. As I have found supra, it is undisputed that in disciplining employees Respondent usually follows a system of progressive discipline; first the employee is counseled and only if the employee continues to engage in the misconduct is the employee then issued a written disciplinary notice, and if that does not put a stop to the misconduct, the employee is either suspended or terminated. It is also undisputed, as I have found supra, that a counseling report in an employee's

[26] That the decision to terminate Mariano was a final decision and not a tentative decision is made abundantly clear by Meagher's admission that immediately after the July 1 meeting between herself and Van Baren, Meagher removed Mariano's timecard from the timecard rack and had Mariano's final paycheck drawn up and made ready. Moreover, Van Baren's testimony that she instructed Meagher to make the final decision concerning Mariano's termination based on what Mariano said during Meagher's interview of her is not only contradicted by Meagher's testimony, but is also contradicted by what Van Baren stated in the affidavit she submitted to the Board during the Board's investigation of this case. In her affidavit there is no mention of this instruction. Quite the opposite, the affidavit, in pertinent part, states: ''On about July 1, I decided that [Mariano] be terminated due to her actions on June 30. . . . I evaluated the information [referring to the information communicated from Meagher to Van Baren on July 1], made my decision and told Meagher, by phone, to carry it out.''

personnel file is not a form of discipline, but is used to alert the employee there is a problem and not to let it happen again. It is only after an employee is issued a counseling report and repeats the misconduct that the employee is disciplined. In the instant case, the information in Mariano's personnel file from Mariano's immediate supervisor, Suitos, which supposedly triggered Respondent's decision to discharge her, and the other information in the file from Mariano's previous immediate supervisors, which supposedly contributed to that decision, consisted solely of ''Employee Counseling Reports'' none which recommended she be disciplined. Thus, it is clear Respondent failed to follow its usual progressive disciplinary procedure in discharging Mariano.

To explain why Respondent failed to follow its usual system of progressive discipline in discharging Mariano, Van Baren testified that in issuing an employee counseling report for Mariano's June 30 conduct, Supervisor Suitos used the wrong form, that Suitos should have used an employee disciplinary notice (Tr. 92–93). Later, in response to counsel's leading question, Van Baren now testified that supervisors used ''Employee Counseling Reports'' and ''Employee Disciplinary Notice'' forms interchangeably (Tr. 1500), contradicting her earlier testimony that Suitos on June 30 had apparently inadvertently used the wrong form in writing up Mariano. These forms on their face, however, clearly indicate they were not meant to be used interchangeably, and other than Van Baren's conclusionary testimony to that effect, there is no evidence whatsoever that they are used interchangeably. Quite the opposite, what the supervisors wrote on the counseling reports contained in Mariano's personnel file clearly show they were intended to counsel rather than discipline Mariano.

Meagher did not testify that Suitos had apparently used the wrong form in reporting Mariano's June 30 conduct or that Respondent's supervisors used the employee counseling report and employee disciplinary notice forms interchangeably. Instead, she testified in effect that the reason Mariano's supervisors, in writing up Mariano, used employee counseling report forms, rather than employee disciplinary notice forms, was that ''a lot of times we ran out of disciplinary notices, that's why we had to use these.'' But, when asked if she was testifying that it was because Respondent had run out of disciplinary notice forms that Mariano's supervisors had placed employee counseling report forms rather than employee disciplinary notice forms in Mariano's personnel file, Meagher testified, ''I can't answer that. I'm not Eva Suitos. I did not write that report.'' There is no evidence whatsoever that any of Mariano's supervisors intended to recommend that Mariano be disciplined for the conduct set forth in the three counseling reports found in Mariano's personnel file or used counseling reports only because there were no more disciplinary notice forms available. Quite the opposite, what the supervisors wrote on those reports clearly show they intended to counsel rather than recommend Mariano be disciplined.

In discharging Mariano, Van Baren and Meagher failed to follow Respondent's usual practice of giving employees accused of engaging in misconduct an opportunity to present their side of the story before deciding to discipline them. As I have found supra, it is Respondent's practice that before Van Baren decides to discipline an employee based on a supervisor's allegations of misconduct, that Van Baren conducts an independent investigation that includes speaking to the accused employee and to other individuals, including members of supervision, who might shed light on the situation. In Mariano's case, as I have found supra, Respondent did not give Mariano an opportunity to give her side of the story before deciding to discharge her.

Meagher testified her reason for not speaking to Mariano in order to give her an opportunity to explain what occurred on June 30, before discharging her, was Meagher was unable to contact Mariano. Meagher testified that during the morning of July 1 she telephoned Mariano's home, was told by the person who answered the telephone that Mariano was not at home, so Meagher left a message that she wanted to speak to Mariano. When asked if her effort to reach Mariano was to instruct her not to come to work that day, rather than for the purpose of asking her about the events of June 30, Meagher evasively testified, ''I really don't know what I was going to say, but I wanted to talk to her.''

Even assuming Meagher testified truthfully when she testified she made an effort to reach Mariano by telephone on the morning of July 1, it should not have surprised Meagher that Mariano would not be home during late morning, since Mariano was employed on the p.m. shift and had worked on June 30 from 2:45 p.m. to approximately 11 p.m. Neither Van Baren nor Meagher testified why it was necessary for Respondent to act in such a hurry to decide what, if any, discipline to impose on Mariano for the June 30 conduct that had been attributed to her. There is no apparent business reason why the matter involved was so pressing that Respondent could not have waited for another 3 hours to speak with Mariano when she arrived for work about the misconduct attributed to her before deciding whether or not to discipline her. Yet, Respondent was in such a rush to discharge Mariano that it did so even before it had an opportunity to speak to Mariano's immediately supervisor, Suitos, who had written the counseling report that triggered Respondent's decision to fire Mariano. Moreover, there are certain unusual circumstances that existed on July 1 that should have compelled Van Baren to take more than the approximately 3 hours it took for her to reach her decision to discharge Mariano.[27] Thus, as described supra, during the week of July 1 Van Baren was present at Respondent's facility for only short periods of time to deal only with those matters that needed her immediate attention, because she was spending virtually all of her time away from the facility with her husband who had recently undergone major surgery. Despite these circumstances, which strongly suggests that Van Baren would normally have acted slower than usual in deciding Mariano's fate, Van Baren within the space of only 3 hours decided to fire Mariano and did so without even speaking to Mariano or Mariano's immediate supervisor, who had not even recommended she be disciplined.

Based on all of the factors set forth above, I reject the testimony of Van Baren and Meagher concerning Respondent's reasons for discharging Mariano and concerning their conversations that led up to Respondent's decision to discharge Mariano. Also, because of the same factors, I find the record establishes that Respondent's reasons advanced for Mariano's

[27] On July 1 between 9 and 10 a.m. Van Baren first learned about the June 30 misconduct attributed to Mariano, and it was during the lunch hour that the decision was made to discharge Mariano.

termination are completely without substance and are pretextual in nature.

b. *Discussion*

On July 1, when she was discharged, Mariano had been employed by Respondent as a CNA for almost 7 years. On June 30, while performing her normal work routine, Mariano was in the facility's main dining room during the patient's dinner hour attending to her patients, when P.M. Shift Supervisor Suitos approached her and stated she had been looking for Mariano because one of Mariano's patients, Sorrentino, needed her assistance and Mariano had been paged a couple of times over the facility's public address system to go to that patient. Mariano responded by explaining to Suitos she had not heard the page and by immediately going to Sorrentino's room. Present in Sorrentino's room was Kumar Biro, another CNA employed on the p.m. shift who was assigned to the same station as Mariano. This CNA, who was a man, informed Mariano when she entered Sorrentino's room that the patient's son had stopped him from assisting Sorrentino because he said his mother wanted a female CNA to assist her to go to the bathroom. Later, near the end of the shift, at approximately 11 p.m., Suitos spoke to Mariano about her failure to promptly assist Sorrentino and prepared an employee counseling report for Mariano's personnel file. This report dated June 30, signed by Suitos, states in substance that on June 30 Suitos had counseled Mariano because Mariano, who was assigned to care for the Medicare patients, left her station with no one there to answer her patients' call lights and failed to answer a page over the public address system to assist patient Sorrentino. The report further states Mariano explained to Suitos she had not heard the page. Suitos ended the report by writing that Mariano should be more alert and receptive to patients' needs and to answer patients' call lights on time. The report did not recommend that Mariano be disciplined and, as found supra, a counseling report such as this one, is not considered to be a form of discipline, but is used by supervision to alert the employee there is a problem and for the employee not to let it happen again. Nevertheless, the above incident supposedly triggered Respondent's abrupt decision to discharge Mariano the next day before she began work.

The General Counsel contends Respondent's reliance on the June 30 incident to trigger its decision to discharge Mariano was pretextual in nature, that the whole record establishes the real reason for Respondent's decision was Mariano's union sympathy and activity, and in view of this Respondent's discharge of Mariano was unlawful as alleged in the complaint. Respondent argues the General Counsel has failed to make a prima facie showing that Mariano's union sympathies and activity was a motivating factor in Respondent's decision to discharge her, because there is a lack of evidence to establish Respondent's knowledge of Mariano's union sympathy and activity. I am persuaded, for the reasons below, that the whole record establishes Respondent was aware of Mariano's prounion sympathy and activity and discharged her for that reason in violation of the Act.

Mariano was one of the more active union adherents employed on the p.m. shift. The Union's organization campaign, insofar as it involved the p.m. shift's employees commenced on May 23 when Union Representative Griffith met at the home of employee Guzman, Mariano's sister, with between 10 and 15 of the p.m. shift's employees, including Mariano. Prior to this it was Mariano and Guzman who laid the ground work for this organizational meeting, when, on approximately May 9, they met with Griffith at Guzman's home. In connection with the May 23 organizational meeting held at Guzman's home, Mariano solicited several of the p.m. shift's employees to attend the meeting.

Respondent knew the Union was engaged in an organizational campaign and that a significant number of its p.m. shift's Filipino employees were union adherents. On July 6, when Supervisor Bagley began to work for Respondent as its P.M. Shift Supervisor, she was told by Nursing Director Van Baren and Assistant Nursing Director Meagher that the p.m. shift's Filipino employees, who the record reveals constituted a majority of the employees on that shift, were ''troublemakers'' who wanted to start a union. Mariano was one of the p.m. shift's Filipino employees.

Respondent was attempting to learn the names of the p.m. shift's employees who were union adherents. In July, shortly after she was hired by Respondent, P.M. Shift Supervisor Bagley was instructed by Meagher to report to management the names of the employees she overheard either discussing the Union, or posting union literature, or wearing union buttons, and, during the latter part of July, in violation of Section 8(a)(1) of the Act, Respondent solicited p.m. shift employees Mejia and Ignacio to spy for Respondent on their coworkers' union activity.

I am persuaded that July 6 was not when Respondent first learned of the Union's organizational campaign and the involvement of the p.m. shift's employees, but knew about this prior to Bagley's July 6 employment, by at least late June, and on July 6 was merely informing the newly hired Bagley what it already knew. I am also persuaded it is reasonable to infer that when Respondent first learned of the Union's organizational campaign and the involvement of the p.m. shift, it took steps to identify which of the employees were union adherents, and did not wait to do this until Bagley's employment or until later in July when it informed Bagley it had been using p.m. shift employees Mejia and Ignacio for this purpose.

Respondent was extremely hostile toward employees who were union adherents. This hostility is revealed by the following: on July 6, when P.M. Shift Supervisor Bagley began work for Respondent, Van Baren and Meagher told her that the Filipino employees employed on the p.m. shift were ''Troublemakers'' who wanted to start a union; later during July, Meagher told Bagley that if the Union's organizational campaign succeeded that Respondent would ''get rid of the problem'' by terminating all of the employees, a none-too-subtle threat to terminate the employees because of their union activity; and, when Bagley refused to comply with Meagher's request that she commit unfair labor practices against the employees employed on the p.m. shift, Respondent, in violation of Section 8(a)(1) of the Act, discharged Bagley for her refusal.

Respondent's decision to discharge Mariano was made in unexplainable haste. On July 1 between 9 and 10 a.m., Respondent's Director of Nurses Van Baren first learned of the June 30 incident, which supposedly resulted in Mariano's discharge, and reached her decision to discharge Mariano not more than 3 hours later, even though due to the illness of her husband Van Baren was only present at Respondent's fa-

cility for short periods of time and then only to deal with those mattes that needed immediate attention. There is no suggestion in the record that the matter of Mariano's discipline was of such a nature that it needed Van Baren's immediate attention or that it needed to be decided in a matter of only 3 hours.

In discharging Mariano, Respondent did not follow its usual progressive system of discipline. The information in Mariano's personnel file from Mariano's immediate supervisor, Suitos, which supposedly triggered Respondent's decision to discharge Mariano, as well as the other information in the file from Mariano's previous supervisors, which supposedly contributed to that decision, consisted solely of ''Employee Counseling Reports,'' none of which recommended that Mariano be disciplined. In view of these circumstances, it is undisputed that Respondent failed to follow its usual system of progressive discipline in its rush to discharge Mariano.

In discharging Mariano Respondent did not follow its usual practice of conducting an investigation which, among other things, would ascertain Mariano's and Supervisor Suitos' version of the pertinent events of June 30 that supposedly led to Mariano's discharge. It is Respondent's usual practice before deciding to discharge an employee, based on a supervisor's allegation of misconduct, to conduct an independent investigation, which includes speaking to both the accused employee and the supervisor. Here Van Baren and Meagher were in such a rush to discharge Mariano that they did not speak to either Mariano or Suitos before deciding to discharge her. The conduct of Van Baren and Meagher in deciding to discharge Mariano without first even speaking with Mariano and Suitos is even more remarkable considering that Suitos' ''Employee Counseling Report,'' which supposedly strongly influenced Respondent's decision to discharge Mariano, did not even recommend that Mariano be disciplined for what had occurred on June 30.

Respondent advanced significantly different reasons for Mariano's discharge at different times and has now abandoned one of the more significant reasons included in Mariano's written notice of termination. On July 1, when Meagher notified Mariano of her termination, she gave Mariano a termination slip that informed Mariano that Respondent's decision to discharge her was motivated in significant part by the fact that ''Mariano has had three separate incidents involving Resident neglect, dating 8–13–86, 2–3–88, and 6–30–92.'' When they testified about the reasons for Respondent's decision to discharge Mariano, however, neither Van Baren nor Meagher mentioned the alleged August 13, 1986, or the February 3, 1988 incidents of ''resident neglect'' attributed to Mariano in the notice of termination. They testified that the information in Mariano's personnel file that resulted in Respondent's decision to terminate her consisted of those documents that showed that on March 4, 1992, Mariano had broken a glass in anger, on April 5, 1992, had spoken a language other than English while on duty, and on June 30 had neglected one of her patients.

As discussed at great length supra, all of Respondent's reasons for discharging Mariano, those set forth in Mariano's written notice of termination as well as those advanced during the hearing, are either completely without substance or pretextual in nature.

Respondent's knowledge of the Union's organizational campaign and the p.m. shift employees' support of the campaign; Respondent's efforts to learn the identify of the p.m. shift employees who were union adherents; Respondent's evident union animus; Respondent's haste in deciding to discharge Mariano; Respondent's failure to follow its usual system of progressive discipline when it decided to discharge Mariano; Respondent's failure to interview either Mariano or Supervisor Suitos before deciding to discharge her, in derogation of the way it usually investigates matters involving employees' discipline; Respondent advanced different reasons at different times for Mariano's discharge, and has now abandoned one of the major reasons it initially advanced for her termination; and, all of the reasons advanced by Respondent for Mariano's discharge are either completely without substance or pretextual in nature; when considered in their totality the aforesaid factors are sufficient to create the inference that Respondent was aware of Mariano's union sympathies and activity and discharged her for that reason.[28] I, therefore, conclude that the General Counsel has established by a preponderance of the evidence that Respondent's animus toward Mariano because of her prounion sentiments and activity was a motivating factor for Respondent's decision to discharge her.

The Respondent does not assert any business reason, other than the ones that I have found to be without substance and pretextual, for discharging Mariano even if she had not been a union adherent. I, therefore, find that Respondent's discharge of Mariano on July 1, 1992, violated Section 8(a)(1) and (3) of the Act.

As set forth infra, to remedy Mariano's unlawful discharge I have recommended the usual remedy of reinstatement and backpay. Respondent does not content that Mariano forfeited her right to reinstatement and backpay by virtue of her postdischarge conduct; her attempt to punch Meagher in the face. Nevertheless, because it involves the appropriateness of the Board's remedy in this case, I have considered this issue and find that under all the circumstances, Mariano's attempted physical assault did not rise to the level of conduct so flagrant as to require forfeiture of reinstatement and backpay.

In so concluding, I considered that only after Mariano had unsuccessfully begged Meagher to rescind her discharge and had become so distressed that she started to cry and obviously did not realize what she was doing, that Mariano attempted to punch Meagher in the face. Thus, Mariano's attempt to physically assault Meagher was neither deliberate nor premeditated, but was a spontaneous response to her unlawful discharge and, was clearly provoked by it. In other words, what occurred here is that a normal nonviolent person was goaded into momentary intemperance by the wrong already done to her. These circumstances, when considered in the light of the applicable Board law that I am obliged to

[28] It is settled law that the same body of circumstantial evidence may constitute proof both that an employer knew about an employee's protected activity and that it took adverse action against the employee for unlawful reasons. *Abbey's Transportation Services*, 284 NLRB 698 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Long Island Limousine Service Corp*., 468 F.2d 292, 295 (2d Cir. 1972).

follow,[29] has persuaded me to recommend, albeit reluctantly, the usual reinstatement and backpay remedy in Mariano's case. *Blue Jeans Corp*., 170 NLRB 1425 (1968) (no forfeiture when emotionally distressed discriminatee chased and threatened to kill a supervisor with scissors after discharge); *Burlington Industries*, 144 NLRB 272, 282 (1963) (no forfeiture when supervisor provoked brief physical contact); and, *Precision Window Mfg.*, 303 NLRB 946 (1991) (no forfeiture where emotionally distressed discriminatee called supervisor obscene names, challenged him to a fight, and threatened to kill him after discharge), enforcement denied on this point, 963 F.2d 1105 (8th Cir. 1992).

3. The July 22 discharges of Fe Calabiao, Estella Abueg, and Ethel Tarrosa, and the July 22 suspensions of Florencio Baldoza, Joanne Mejia, Lodring Ignacio, and Irineo Llever

a. *The evidence*

What occurred July 21 on the p.m. shift

On July 21 the station 3 and 4 nurses at work on the p.m. shift were as follows: station 3—Charge Nurse Calabiao and CNAs Baldoza, Llever, Mejia, and Ignacio; station 4—Charge Nurse Linda Leonard and four CNAs including Tarrosa and Abueg. Abueg had been scheduled to work at station 3 on July 21, but switched assignments with Ignacio, who had been scheduled to work at station 4. Calabiao, Baldoza, Llever, Mejia, Ignacio, Tarrosa, and Abueg are Filipinos.

The CNAs are entitled to a 30-minute meal break. The practice is for a station's charge nurse to notify the station's CNAs at the start of the work shift, when they are scheduled that night to take their meal break and to write this information in the chart maintained at the station's desk.

On July 21 Calabiao scheduled Mejia's and Ignacio's meal break from 8 to 8:30 p.m. and Baldoza's and Llever's 8:30 to 9 p.m. Baldoza and Llever took their break, as scheduled, and returned to their station at 9 p.m., as scheduled. Mejia and Ignacio did not return to the station from their break at 8:30 p.m., as scheduled. Therefore, at 8:30 p.m. when Baldoza and Llever went on break, there were no CNAs left at station 3 to assist patients. Because station 3 covers such a large area, when Baldoza and Llever left the station at 8:30 p.m. for their break they did not realize the other CNAs assigned to the station had failed to return from their break, but when they went to the breakroom and found Mejia and Ignacio there, they must have realized that all of the CNAs assigned to station 3 were off duty.

Bagley, the P.M. Shift Supervisor, discovered there were no CNAs at station 3, when the facility's alarm system alerted her that some of the station's patients were leaving their area without the knowledge of the nurses assigned to the station. Bagley immediately went to station 3 and discovered that neither Charge Nurse Calabiao nor any of the CNAs were there. She unsuccessfully tried to locate Calabiao by having her paged, going to the room of each station 3 patient, and going to the room where the employees take their breaks. As she entered the breakroom Ignacio was just leaving and the other three CNAs assigned to station 3 were there. Bagley said nothing to them at this time, but continued her search for Calabiao until she observed Calabiao walking toward station 3 from the direction of station 4. Bagley confronted Calabiao and told her that all of the CNAs assigned to her station were on their meal break away from the station at the same time, leaving the patients unattended. Calabiao replied it was not her fault because she had scheduled them to take their breaks at different times, Mejia and Ignacio at 8 p.m. and Baldoza and Llever at 8:30 p.m. Bagley ended this conversation by stating she would return later during the shift, after the patients' visitors had left, to discuss the matter further.

Calabiao after her conversation with Bagley searched for Mejia and Ignacio and when she located them they were still taking their break, even though it had ended. Calabiao asked why they had not returned to work and they did not answer her.

Later, during the shift, Bagley met with Calabiao, Ignacio, Baldoza, and Mejia.[30] She told them she realized they were working under a great deal of stress, but that was no excuse for abandoning the station. She told them this was a serious violation of accepted nursing practice, but she would only give them a serious verbal reprimand, rather than a written reprimand, because a written reprimand would constitute grounds for termination. Bagley asked them to promise her they would never again abandon the work station as they had done that evening. The group apologized and stated they would not engage in that type of conduct again. Bagley repeated her promise not to issue them a written reprimand for their conduct.

Later during the shift, Bagley returned to station 3 and spoke again to some of the CNAs. She told them they should think about what they had done and realize it was a serious breach of nursing practice and cautioned them not to tell anyone else about the matter.[31]

When Bagley left the facility at the end of her shift on July 21, approximately 11:30 p.m., she discovered that her motor vehicle, which had been parked in the facility's adjacent parking lot, had been vandalized; a tire was slashed, the antenna ripped off, and the windshield cracked.[32] Bagley immediately telephoned a towing service and also reported the

[29] It appears if Mariano had succeeded in striking Meagher in the face, Mariano would have forfeited her right to reinstatement and backpay. *Carthage Fabrics Corp*., 101 NLRB 541, 553–555 (1952) (discriminatee hits supervisor in face with fist at time of discharge); see also *Family Nursing Home & Rehabilitation Center*, 295 NLRB 923 (1989) (forfeiture by discriminatee who physically tried to strike her supervisor with bowling trophy, used profanity, and ripped telephone from wall). Logic would appear to dictate that a discriminatee's unsuccessful attempt to physically assault a supervisor should be treated in the same manner as a successful attempt to physically assault a supervisor. The rationale of the Board's decisions in the cases cited hereinafter, however, as applied to the circumstances of this case, appear to dictate a different result.

[30] Llever was not present at this meeting because she was taking care of a patient.

[31] Bagley testified her reason for advising the CNAs not tell anyone else about what had occurred was to prevent any one of them from being terminated.

[32] As discussed infra, this was not the first time an employee's motor vehicle had been vandalized while parked in Respondent's parking lot.

matter to the police, and, as a result, did not arrive home until approximately 3 a.m.

Bagley's July 22 conversations with Meagher

On July 22 at approximately 9:30 a.m. Bagley telephoned Respondent's facility and spoke to Assistant Nursing Director Meagher. Consistent with her promise not to write the employees up for their July 21 conduct and consistent with her warning to the employees not to inform anyone else of their conduct, Bagley in her conversation with Meagher, did not inform Meagher that station 3's patients the previous evening, had been without the service of all of the CNAs assigned to that station for a significant period of time because all of the CNAs had been taking their meal break. Bagley did inform Meagher, however, that her motor vehicle had been vandalized the previous evening while parked in the Company's parking lot and told Meagher that because of this she would have to buy a new tire. Meagher told Bagley she had already heard about the incident and believed it was done by employees to retaliate against Bagley, and that President M. Shenker had said he would pay for the tire. Meagher also told Bagley not to worry about being late for work that day. Bagley did not indicate she felt the employees were responsible for the damage done to her motor vehicle. In fact she did not believe the employees were responsible. The aforesaid telephone conversation was the only telephone conversation Bagley had with Respondent's management that day.

Later that day, when Bagley arrived for work, either shortly before her usual 2:45 p.m. starting time or at approximately 4 p.m., Meagher met her as she entered the facility.[33] Meagher told Bagley she had learned about the abandonment of station 3, stated that she would ''take care of'' that matter, and asked if Bagley had written up the incident. Bagley replied she had not written it up because she had promised the employees she would not write them up. Meagher stated Bagley ''needed to write these people up'' so Respondent could ''legally cover'' itself and also informed Bagley that Calabiao had already been discharged. In addition, Meagher told Bagley that Meagher had prepared language for Bagley to use for her writeups and handed Bagley, General Counsel's Exhibit 10, a document written by Meagher captioned ''Fe Calabiao'' that read:

> On the date of 7–21–92 while working on station III on the 3–11 p.m. shift Fe could not be located for 45 min. by the NSG supervisor. She also allowed CNA's to leave the station & go on break without the proper CNA floor coverage. There were nine residents left in bed (out of a total census of 36) who should have been in chairs. She also displayed insubordination to the registered nursing supervisor.

Bagley again told Meagher she did not want to writeup the employees because she promised only to verbally reprimand them and pointed out to Meagher that the language Meagher had prepared for Bagley to use for Calabiao's writeup was not correct insofar as it stated Calabiao had been insubordinate to Bagley because, Bagley told Meagher, no one had been insubordinate to her. Bagley also told Meagher she had no knowledge of that part of Meagher's prepared language that stated, ''[T]here were nine residents left in bed (out of total census of 36) who should have been in chairs.'' Meagher insisted that Bagley comply with her instructions to writeup the employees for their conduct on July 21 and told her that the writeups should be backdated to July 21 because, Meagher explained, ''[I]t had to be legal and done right and put in their files.'' Accordingly, on July 22 Bagley prepared and signed employee disciplinary notices for Calabiao and Mejia, which she dated as having been issued on July 21.

The notice prepared by Bagley for Calabiao's personnel file included the same language as found in the above-described language that Meagher had told Bagley to use, plus these additional comments: ''This is not the first time these situations have occurred—And previous talks re: these problems have been ignored—showing insubordination to the nursing supervisor.'' In the space reserved in the notice for ''Action Taken'' Bagley checked ''written reprimand & verbal.''

The notice prepared by Bagley for Mejia's personnel file reads as follows:

> On this date while assigned to station III on the 3–11 p.m. shift— Knowingly left on a dinner break with co-workers and left Stat.III without proper CNA coverage. Her & her co-workers were fully aware of the situation & were given several warnings regarding this problem. Chose to ignore responsibilities & left for a break all together anyway—Shows insubordination for R.N. Nursing Supervisor—Warned of the seriousness of this act & its consequences it could have to the facility.

The above findings concerning Bagley's conversations with Respondent's management on July 22 about the events of July 21 are based on Bagley's testimony that conflicts with the testimony of Respondent's witness, Director of Nurses Van Baren, whose testimony is corroborated in certain respects by Assistant Director of Nurses Meagher, President M. Shenker, Director of Staff Development Boeger, and Administrator L. Shenker. Their testimony is summarized and evaluated hereinafter.

Van Baren testified she arrived for work on July 22 at 7 a.m. and shortly thereafter received a telephone call from Bagley who told her the following:the previous evening the nurses assigned to station 3 abandoned the station for approximately 45 minutes, and she had been unable to located Calabiao; Calabiao's work performance had previously been unsatisfactory; the CNAs assigned to station 3 were finally located by Bagley in the breakroom taking an unauthorized break; in the breakroom with the station 3 CNAs were CNAs Abueg and Tarrosa, from another station, who were also taking an unauthorized break; Bagley instructed all of the CNAs in the breakroom to return to their stations and they refused to obey Bagley and laughed in Bagley's face and questioned her authority; this was not the first time Abueg and taken an unauthorized break and been insubordinate to Bagley and Abueg had also not gotten a patient out of bed for dinner contrary to Bagley's instruction; when Bagley left work that night she discovered her motor vehicle had been vandalized,

[33] Whether Bagley arrived for work shortly before 2:45 p.m., as Bagley testified, or at approximately 4 p.m., as Respondent claims, is not material to the disposition of this case.

which was parked in the facility's parking lot; and, employees laughed at Bagley as they left the parking lot.

Van Baren also testified that Bagley after telling Van Baren what had occurred on July 21, told Van Baren she would not return to work unless the employees employed on the p.m. shift were disciplined; she stated she would not work with employees who had abandoned the station and had refused to obey her instructions to return to work, because she could not work with persons who behaved that way toward her. Van Baren testified she responded to what Bagley had told her by informing Bagley she intended to speak about the matter to Administrator L. Shenker, assured Bagley of management's support, stated management did not want her to quit, and while acknowledging there had previously been problems between the p.m. shift's employees and their supervisor, told Bagley that management would work out those problems with Bagley, and ended the conversation by stating Van Baren would call Bagley back later that day to discuss the matter further.

Van Baren testified that later the same morning, at approximately 9:30 a.m., while in the middle of the daily meeting of department heads, she received a second telephone call from Bagley and took the call while in the meeting room in the presence of the several department heads. Among the department heads who were present at that time were President M. Shenker, Assistant Nursing Director Meagher, Director of Staff Development Boeger, Dietary Kitchen Supervisor Senn, Housekeeping Maintenance Supervisor Lacuna, and Shift Supervisor Thelma Smith.

Van Baren testified that when Bagley spoke to her on this occasion, Bagley, who was crying, asked if Van Baren had spoken to Administrator L. Shenker and stated she was attempting to get her motor vehicle repaired and asked if Respondent would pay for the damages, and Van Baren told her she had not as yet spoken to Administrator L. Shenker, and turned the telephone over to President M. Shenker.

President M. Shenker testified that during the July 22 meeting of department heads, Van Baren told him Bagley was on the telephone and Shenker asked to speak to Bagley after Van Baren had finished talking to her. He testified Bagley told him about her motor vehicle being vandalized and stated she did not believe she would come to work that day because she was frightened. President M. Shenker testified he told Bagley Respondent would pay for all of the damage done to her motor vehicle, not to be frightened, that she was needed by Respondent as its P.M. Shift Supervisor, that if she returned to work Respondent would give her as much backup and help as possible, and testified Bagley ended the conversation by stating she would report to work that day, but would be unable to do so until 4 p.m.

Boeger testified that on July 22, at approximately 9:45 a.m., during the meeting of the department heads, Van Baren received a telephone call and after talking on the telephone for approximately 15 minutes turned it over to President M. Shenker who continued to talk to whoever was on the telephone. Boeger further testified that sometime within the next hour she was informed by Van Baren and President M. Shenker that Bagley had told them her car had been vandalized the previous evening, that no one employed on the p.m. shift had assisted her but had driven away laughing, and the CNAs and the charge nurse had abandoned station 3 for 45 minutes.[34]

In the affidavit submitted by Van Baren to the Board during the investigation of the charges in these cases, she stated, in substance, that Bagley before leaving work on July 21 had left in Van Baren's office, the General Counsel's Exhibit 7(g), the above-described employee disciplinary notice Bagley prepared for Mejia's personnel file, and General Counsel's Exhibit 7(h), the above-described employee disciplinary notice Bagley prepared for Calabiao's personnel file, and that Van Baren found the two disciplinary notices in her office when she came to work at 7 a.m. on July 22 and, during the afternoon of July 22, Van Baren asked Bagley to prepare additional employee disciplinary notices for the personnel files of the other p.m. shift employees who, on July 21, were absent from their work station and were uncooperative and insubordinate, but that Bagley never submitted this requested written information to either Van Baren or to anyone else from management.

Initially, when questioned at the hearing about the above-described part of her affidavit, Van Baren testified it was all correct except she did not remember whether General Counsel's Exhibits 7(g) and (h) were waiting for her in the office on July 22 when she arrived at 7 a.m. for work or whether Bagley gave them to her later that day. Subsequently, Van Baren testified that during the morning of July 22 she had in her possession General Counsel's Exhibit 7(g) (the Mejia disciplinary notice), but it was not until the afternoon of July 22 that she received from Bagley General Counsel's Exhibit 7(h) (the Calabiao disciplinary notice). This is contrary to Van Baren's earlier testimony that she was positive it was not until the night of July 22 that Bagley left General Counsel's Exhibit 7(g) in Van Baren's office,[35] and is contrary to that part of Van Baren's affidavit that states Respondent's decision to discharge Calabiao was based ''primarily'' on the information contained in General Counsel's Exhibit 7(h), which Van Baren's affidavit states was received by Van Baren on her arrival at work at approximately 7 a.m. on the morning of July 22.

President M. Shenker testified it was on July 22 at approximately 8:30 a.m. when he arrived for work that he learned about the abandonment on July 21 of station 3 by the p.m. shift's employees. He testified Van Baren, in the presence of Meagher, told him and Meagher that Bagley had previously telephoned her and told her the p.m. shift had abandoned station 3, that they could not be found for 45 minutes, and Bagley's motor vehicle had been vandalized and, according to President M. Shenker, Van Baren also told him and Meagher she doubted whether Bagley would return to work because Bagley had sounded frightened. President M. Shenker further testified that Van Baren, while she was speaking to them, was holding certain documents that Van Baren told Shenker and Meagher were reports about the

[34] Boeger testified the first time she learned about the abandonment of station 3 was when, as she testified, sometime between 9:45 and 10:45 a.m. on July 22, Van Baren and President M. Shenker told her this is what Bagley had reported.

[35] Van Baren testified she was positive it was not until the night of July 22 that Bagley left G.C. Exh. 7(g) (Mejia's disciplinary notice) because, since she did not possess G.C. Exh. 7(g) during the morning of July 22 she had to prepare another disciplinary notice, G.C. Exh. 7(f), concerning Mejia's suspension.

above-described conduct that Bagley had slipped under Van Baren's office door before leaving work on July 21. President M. Shenker testified that while he did not read the reports at that time, he discussed with Van Baren and Meagher the possibility of discipline based on what had been reported by Bagley, but no decision was reached at that time because they had to attend the 9 a.m. daily meeting for department heads.

Van Baren did not corroborate President M. Shenker's testimony about Van Baren's 8:30 a.m. meeting with President M. Shenker and Meagher concerning what she learned that day from Bagley about the events of July 21. Nor was President M. Shenker's testimony corroborated by Meagher, a witness for Respondent, who was not questioned by Respondent about this alleged meeting. Moreover, when asked, ''[W]hen was the first time you heard on July 22 that there had been problems the previous night,'' Meagher did not corroborate President M. Shenker's testimony about the alleged 8:30 a.m. meeting between Meagher, President M. Shenker, and Van Baren, but testified she first learned about the problems of the previous night on the p.m. shift during the 9 a.m. meeting of the department heads when Van Baren stated that Bagley's car had been vandalized and there ''had been a problem locating personnel on station 3.''

Meagher was not questioned about Bagley's testimony that it was Meagher, not Van Baren, to whom Bagley spoke over the telephone on July 22 at approximately 9:30 a.m. and did not deny Bagley's testimony. Meagher, however, did contradict Bagley's account of what occurred when Bagley reported for work on July 22. Meagher testified that when Bagley arrived for work on July 22 she ''told me what happened. She said she just did not know how to write it up. She said she had problems grammatically . . . constructing grammatically correct statements,'' and asked Meagher to show her how to writeup what had occurred on the p.m. shift on July 21 and, at this point, Meagher prepared General Counsel's Exhibit 10, the language for the disciplinary notice concerning Calabiao's conduct, and gave it to Bagley stating, ''this is how I would write it.''

Administrator L. Shenker, who was not present on July 22 at the 9 a.m. meeting of the facility's department heads, testified when she arrived at the facility on July 22 at 10:15 a.m. she met with President M. Shenker, Van Baren, and Meagher at which time Van Baren, among other things, told Administrator L. Shenker Bagley had told her that the previous evening Bagley's car had been vandalized and station 3 had been abandoned for 45 minutes. Administrator L. Shenker further testified that in giving this information to her, Van Baren also ''referred to two written reports by Bagley.''

Administrator L. Shenker also testified that later during July 22, between 3:15 and 3:30 p.m., she met in her office with Bagley, that this meeting was arranged by Nursing Director Van Baren, who, acting on Administrator L. Shenker's instruction, summoned Bagley to Shenker's office. According to Administrator L. Shenker what was stated during this meeting, follows: Shenker asked Bagley to tell her what had occurred during the previous evening; Bagley told her she had been unable to find the CNAs and the charge nurse and no one was present to assist her and when she paged for the charge nurse no one answered; when she left work at the end of the shift, she discovered her motor vehicle had been vandalized and the other employees left the parking lot without aiding her; Shenker asked if during the evening of July 21 Bagley wrote ''anybody up for anything,'' explained to Bagley Respondent needed the disciplinary notices she had prepared ''in order to make this Kosher'' and so Respondent had a completely clear picture of what occurred; Bagley responded by stating, ''yes'' she had prepared disciplinary notices concerning the conduct she had described and these written notices were in the purse she was carrying; Shenker instructed her to give the disciplinary notices to Van Baren; and, Bagley stated she would give them to Van Baren.

The principal reason I credited Bagley's testimony concerning the information she provided on July 22 to Respondent's management about the events of July 21 and who in management she spoke to and what she said, is that Bagley's testimonial demeanor—the way she spoke, the tone of her voice, and the way she looked and acted while testifying—convinced me that she was a truthful and reliable witness, whereas the poor testimonial demeanor of Van Baren, Meagher, Boeger, and M. and L. Shenker the convinced me they were tailoring their testimony about what occurred on July 22 to suit Respondent's case, regardless of what really occurred. In addition, there are other factors, set forth hereinafter, which reinforce this conclusion.

It is not plausible that after promising Calabiao, Baldoza, Mejia, Ignacio, and Llever that she would not write them up for their July 21 conduct and after cautioning them not to tell anyone else about their conduct because of its seriousness, that the next morning Bagley would have informed Van Baren of this conduct and issued an ultimatum to Van Baren that unless Respondent terminated the employment of these employees for leaving their work station unattended and for being insubordinate to her, that Bagley would quit her job with Respondent.[36] Moreover, if Bagley had issued this ultimatum she most certainly would not have submitted to Van Baren disciplinary notices concerning only Calabiao and Mejia, and thereafter ignored Van Baren's request that she submit disciplinary notices for the other employees. If Bagley, as Van Baren testified had told Van Baren that all of the CNAs employed on station 3 plus CNAs Abueg and Tarrosa had been in the breakroom at the same time taking an unauthorized break, that when Bagley directed them to return to work they refused and laughed in her face and questioned her authority, and that unless these employees were terminated she would quit her job, Bagley most certainly would have promptly prepared disciplinary notices for each one of these offenders, not for just Mejia and Calabiao.

As described above, when she testified about her receipt of the disciplinary notices for Calabiao and Mejia prepared by Bagley, Van Baren contradicted herself more than once

[36] Calabiao and Baldoza corroborated Bagley's uncontroverted testimony that on July 21 she promised Calabiao and the four CNAs assigned to station 3 that her reprimand issued to them that evening was meant to be only a verbal one and promised not to write them up for their conduct, and cautioned them to keep their conduct to themselves. I have considered that on July 21, at the conclusion of the work shift, Bagley discovered her motor vehicle had been vandalized. There is no evidence, however, that Calabiao or the station 3 employees whom Bagley verbally reprimanded were responsible for this. More significantly, there is no evidence that Bagley believed this to be the case and because of this reneged on her promise to these employees.

and her testimony was contradicted by the affidavit she submitted to the Board during the investigation of these cases.

Meagher's testimony concerning the reason she drafted the language for Bagley to use in Calabiao's disciplinary notice was incredible. As described supra, when Bagley came to work on July 22, according to Meagher, Bagley asked for Meagher's assistance in preparing Calabiao's disciplinary notice because she explained to Meagher that she ''had problems grammatically . . . constructing grammatically correct statements.'' There is no evidence that prior to or subsequent to this occasion Bagley, who had approximately 30 years' experience as a registered nurse, ever sought the assistance of Meagher or of any one else in preparing written reports or that she otherwise had difficulty expressing herself in writing. Moreover, Meagher's testimony does not jibe with the testimony of Van Baren that the disciplinary notice Bagley prepared for Mejia was already in Van Baren's possession as early as 7 a.m. on the morning of July 22. If Bagley was able to draft Mejia's disciplinary notice without going to Meagher for help with her grammar, why would she need this kind of assistance for Calabiao's discharge notice.

In finding General Counsel's Exhibit 10 was drafted by Meagher, without Bagley's assistance, I considered that part of the language contained therein is consistent with Bagley's testimony that on July 21 she was unable for approximately 45 minutes to locate Calabiao and during this period the CNAs assigned to Calabiao's station were away from the station taking their break. I am convinced, however, Respondent received this information from someone other than Bagley on July 22 after it had already notified Calabiao she was discharged. Perhaps Respondent received this information from one of the other p.m. shift employees who observed Bagley trying to locate Calabiao or from one of the several visitors of patients who were present at station 3, when there were no nurses available to assist patients and Bagley was searching for Calabiao to remedy the situation. The conclusion that Meagher did not receive the information contained in General Counsel's Exhibit 10 from Bagley is bolstered by the fact that the other language in the document could not have originated with Bagley, who, contrary to what appears in General Counsel's Exhibit 10, credibly testified that Calabiao was not insubordinate on July 21, but was cooperative and respectful toward Bagley, as always. Bagley also credibly testified she had no knowledge of the part of General Counsel's Exhibit 10 that alleges that Calabiao had allowed nine residents to be left in their beds, who should have been in chairs. The record reveals that Meagher included this latter allegation, based on information given to her by Respondent's director of staff development, Boeger, who testified that the previous evening at 5 p.m. she had visited the rooms of each patient and observed that on station 3 that nine of the residents were being fed their dinners while in bed, who should have been taken to the facility's dining room for dinner.

Department Heads Senn, Lacuna, Smith, and Meagher, although present at the July 22 meeting of Respondent's department heads were not called by Respondent to corroborate the testimony of Van Baren that it was Van Baren, rather than Meagher, who Bagley spoke to when she telephoned Respondent's facility at approximately 9:30 a.m. on July 22. Senn, Lacuna, and Smith are still employed by Respondent, and Meagher, although no longer employed by Respondent testified on Respondent's behalf about other matters and when she testified gave me the impression she was more than just friendly toward Respondent.

President M. Shenker's above testimony that his July 22,8:30 a.m. meeting with Van Baren and Meagher was not corroborated by either Meagher or Van Baren and, as I have found supra, Meagher contradicted Shenker's testimony by testifying it was at the July 22, 9 a.m. meeting of Respondent's department heads that Meagher first learned about the problems experienced with the p.m. shift on July 21.

Administrator L. Shenker's testimony that when she arrived at the facility on July 22 at approximately 10:15 a.m. and met with Van Baren, President M. Shenker and Meagher, that Van Baren informed her she had reviewed two written reports that she had received from Bagley concerning the events of July 21, was not corroborated by either President M. Shenker, Van Baren, or Meagher and is contradicted by the testimony of Van Baren that at this point in time Van Baren only possessed one written report from Bagley, the disciplinary notice prepared by Bagley for Mejia.

Administrator L. Shenker's further testimony about her meeting with Bagley on July 22 between 3:15 and 3:30 p.m. is rejected for these reasons: that the meeting occurred is not corroborated by the testimony of Van Baren, who supposedly directed Bagley to meet at this time with Shenker, pursuant to Shenker's instruction, and is inconsistent with Van Baren's testimony that Bagley did not arrive for work until 4 p.m. on July 22; and, Shenker's testimony concerning what was said by herself and Bagley at this meeting about the employees' disciplinary notices prepared by Bagley is not consistent with Shenker's prior testimony that earlier that day Van Baren had informed Shenker Bagley had already furnished Van Baren with two written disciplinary notices concerning the events of July 21,[37] and also does not square with Van Baren's testimony that General Counsel's Exhibit 7(g), Mejia's disciplinary notice prepared by Bagley, had been left on July 21 at the facility by Bagley for Van Baren, or with Meagher's testimony that when Bagley arrived for work at 4 p.m. on July 22 she told Meagher she did not know how to writeup what occurred on July 21. Moreover, it is undisputed that during the afternoon of July 22, Bagley did not give Van Baren any written report or notices concerning the events of July 21. I find it difficult to believe that if Bagley told Administrator L. Shenker that she possessed such written materials in her purse and stated, in response to Administrator L. Shenker's instruction, that she would give those materials to Van Baren, that she would not have done so. It is for all of these reasons, besides the poor testimonial demeanor of Administrator L. Shenker, that I reject her uncorroborated testimony that she met with Bagley during the afternoon of July 22. I find this meeting never occurred and that it is another instance of testimony fabricated by one of Respondent's witnesses in an effort to support Respondent's case.

It is for the above reasons that I rejected Respondent witnesses' testimony concerning the information Bagley pro-

[37] I note that Administrator L. Shenker also testified while she did not take the time during the morning of July 22 to read the written notices prepared by Bagley, which Van Baren mentioned Respondent possessed, that sometime later that same day Shenker took the time to look at these written reports.

vided to Respondent's management on July 22 about the events of July 21 and who in management she communicated this information to and what was said, and credited Bagley's testimony.

Respondent decides to discharge Calabiao, Abueg, and Tarrosa, and to suspend Baldoza, Mejia, and Ignacio

President M. Shenker testified that immediately after the receipt of Bagley's 9:30 a.m. telephone call on July 22, President M. Shenker, Van Baren, and Meagher went to President M. Shenker's office, where they discussed what discipline should be imposed on the p.m. shift's employees for their July 21 misconduct.

Van Baren testified that at one point during this discussion the consensus was that all seven of the employees involved in the alleged misconduct should be discharge, but eventually it was decided to discharge Calabiao, Abueg, and Tarrosa and to suspend for 3 days Baldoza, Mejia, Ignacio, and Llever. According to Van Baren, it was ''jointly decided'' by Van Baren and President M. Shenker to suspend Baldoza, Mejia, Ignacio and Llever, rather than discharge them, because in considering their ''discipline records'' it was concluded these four ''had relatively good performance records.''

When the testimony of President M. Shenker, Administrator L. Shenker, and Van Baren is considered as a whole, it establishes that Respondent's decision to discharge Calabiao, Abueg, and Tarrosa, and to suspend Baldoza, Mejia, Llever and Ignacio, occurred sometime between 9:30 and 10:15 a.m. According to Van Baren, when this decision was reached the following occurred: Van Baren immediately prepared the documents needed by Respondent's payroll department to issue the final paychecks to the discharged employees; President M. Shenker stated he would inform the discharged employees by telephone about their termination; Respondent's director of staff development, Boeger, was instructed by President M. Shenker to notify the suspended employees by telephone of their suspension; and subsequently, later that day, Van Baren prepared the discipline notices for the dischargees, and either Van Baren or Boeger prepared the discipline notices for the suspended employees.

It is not part of President M. Shenker's duties to become involved in personnel matters, including matters involving employee discipline, and he normally does not do so. He testified his role in the July 22 decision to discharge and suspend the above-named employees was that he agreed to do whatever Van Baren recommended.

Administrator L. Shenker did not arrive at the facility on July 22 until 10:15 a.m. and according to the testimony of Van Baren and President M. Shenker the decision to discharge and suspend the above-named employees had been reached and was already in the process of being implemented by the time Administrator L. Shenker arrived.

Administrator L. Shenker testified that when she arrived at the facility at 10:15 a.m. she was notified of the decision to discharge three and suspend four employees and met immediately with President M. Shenker, Van Baren, Meagher, and Boeger, at which time the basis for the decision was explained to Administrator L. Shenker who, based on what she was told, concurred in the decision. Administrator L. Shenker further testified that although Calabiao had a ''good record, her expected higher level of responsibilities as a charge nurse was the determining factor in the decision to discharge her'' and testified that Tarrosa and Abueg were discharged ''because of their work records'' and the other four CNAs were suspended, instead of discharged, ''because of their relatively good work records.''

As I have found supra, it was not until Bagley arrived for work on July 22, in the mid to late afternoon, that she spoke to anyone from Respondent about the way the nurses under her supervision had conducted themselves at work during the previous work shift. I also rejected, supra, President M. Shenker's uncorroborated testimony that on July 22 at approximately 8:30 a.m. he met with Van Baren and Meagher at which time they discussed what discipline to impose on the p.m. shift employees for the way they had conducted themselves at work during the previous work shift. Therefore, accepting the above testimony of Van Baren and M. and L. Shenker as a reliable indication of when, on July 22, Respondent decided to discharge Calabiao, Abueg, and Tarrosa, and to suspend Baldoza, Llever, Mejia, and Ignacio, it is clear that Respondent made this decision in less than 1 hour, before Respondent spoke to any of the seven employees so as to give them an opportunity to explain what had occurred, before Respondent had received any communication from the employees' immediate Supervisor Bagley about what had occurred, and before it ever received a recommendation from Bagley about what, if any, discipline to impose on one or more of the employees. Since Respondent normally investigates allegations of employee misconduct before deciding what, if any, discipline to impose, Respondent's rush to discipline the seven employees herein can only be characterized as extraordinary conduct.

Calabiao's discharge

On July 22 Calabiao had been employed by Respondent since February 1, 1988, first as a CNA, and then since 1990 as a charge nurse who normally worked the p.m. shift.

During the period immediately before her July 22 discharge Calabiao on several occasions talked with other p.m. shift employees ''about the Union,'' when they met after work in the parking lot adjacent to Respondent's facility.

On July 22, at approximately noontime, Calabiao received a telephone call at home from President M. Shenker. He told her she had been discharged and should come to the facility the next day to pick up her paycheck. Calabiao asked why she had been discharged. President M. Shenker replied Calabiao could not ''control'' her CNAs who, Shenker told Calabiao, had vandalized a motor vehicle by flattening the tire and breaking the windshield and this was the reason for her discharge. Calabiao stated she did not know what Shenker was talking about. Shenker repeated Calabiao had been discharged and should come the next day for her paycheck. This ended the conversation.

The above description of this conversation is based on Calabiao's testimony. President M. Shenker testified that when the decision to discharge Calabiao was made on July 22, he immediately telephoned Calabiao and told her that Van Baren and he had decided to discharge her ''because of the events of the night before''; that her station had been abandoned by the CNAs for 45 minutes. Calabiao, according to President M. Shenker, replied she would like to speak personally to Shenker about the matter, and Shenker told her to come to the facility to pick up her termination check from

the payroll department and after she had received her check to come to his office, and Calabiao stated she would come to the facility on July 23 at 10 a.m. President M. Shenker did not testify that anyone was present when he telephoned Calabiao or that he had asked anyone to witness the telephone call. Respondent Director of Staff Development Boeger testified, however, that on July 22 President M. Shenker instructed her to accompany him to Boeger's office while he made telephone calls he wanted her to witness, and further testified that at this time she was present when President M. Shenker telephoned Calabiao and that she heard President M. Shenker tell Calabiao ''she was terminated for abandoning her station.'' Boeger did not corroborate the remainder of President M. Shenker's testimony concerning this conversation. I credited Calabiao's testimony and rejected President M. Shenker's and Boeger's because Calabiao's testimonial demeanor was better than President M. Shenker's and Boeger's that was poor.

Later, on July 22, Calabiao telephoned Van Baren's office and was told Van Baren was too busy to speak to her and the call was referred to Meagher. Calabiao asked Meagher if she was scheduled to work that day. Meagher told her she was not scheduled to work, that she should not come to work anymore, and that Van Baren would return her call. Van Baren did not return the call.

Calabiao did not go to Respondent's facility on July 23 for her paycheck, as instructed by President M. Shenker, but went there on July 27, at which time she asked to speak with Administrator L. Shenker and the two of them met in Administrator L. Shenker's office.

Calabiao began the meeting by asking for her ''termination papers.'' Administrator L. Shenker told her the ''termination papers'' had not been completed and would be mailed to her. Administrator L. Shenker asked if Calabiao knew the reason for her discharge. Calabiao answered that President M. Shenker had told her she had been fired because the CNAs who she supervised had broken a motor vehicle's windshield and flattened its tire. Administrator L. Shenker stated President M. Shenker could not have told her that. Calabiao insisted this was what she had been told over the telephone by President M. Shenker. Administrator L. Shenker telephoned President M. Shenker and asked him to come to the office and when he entered told him Calabiao was claiming he had told her the reason she was discharged was because of the flat tire and broken windshield. President M. Shenker denied saying this to Calabiao and stated the reason she was discharged was because of Bagley's writeup. Administrator L. Shenker at this point, reading from a document she was holding, stated Calabiao had been absent from her work station for 45 minutes. When Calabiao was asked by the Shenkers about her alleged 45-minute absence from the station, Calabiao denied having been absent from the station as alleged, and stated she never left the station.[38]

On July 29 Calabiao wrote Respondent asking for the termination papers she had requested during the July 27 meeting. Shortly thereafter, Calabiao received from Respondent, by mail, a memo addressed to Respondent's payroll department signed by Administrator L. Shenker, dated July 27, which stated that effective July 22, Calabiao and been ''terminated for not following job description of charge nurse.''

As I have found supra, the testimony of President M. Shenker, Administrator L. Shenker, and Nursing Director Van Baren, is to the effect that sometime between 9:30 and 10:15 a.m. on July 22, President M. Shenker and Van Baren jointly decided to discharge Calabiao. President M. Shenker did not testify why he and Van Baren reached this decision, but testified he merely followed Van Baren's recommendation. Van Baren testified her decision to discharge Calabiao was based entirely on the information she received from P.M. Shift Supervisor Bagley when Bagley telephoned her on July 22 shortly after 7 a.m. and again at 9:30 a.m. (Tr. 1627–1628). I have found, supra, that no such conversations occurred and that the only information Respondent received from Bagley as of the time President M. Shenker and Van Baren jointly decided to discharge Calabiao was that Bagley's motor vehicle had been vandalized on July 21 while parked in Respondent's parking lot. In communicating this information to Assistant Director of Nurses Meagher, as described supra, Bagley did not expressly or by implication indicate it was the CNAs employed on the p.m. shift who were responsible for the damage done to the motor vehicle or that she believed this to be the case. Nor is there evidence that Respondent had received information that reasonably led it to believe that any one of the CNAs employed on the p.m. shift under Calabiao's supervision were responsible for damaging Bagley's motor vehicle. Thus, it is not surprising the record reveals that none of the p.m. shift employees, in particular the four employed on Calabiao's station, were ever disciplined by Respondent for damaging Bagley's motor vehicle. In view of the aforesaid circumstances, I find that the reason President M. Shenker gave to Calabiao on July 22 for her discharge—that Calabiao's CNAs had vandalized Bagley's motor vehicle that indicated Calabiao could not ''control'' her CNAs—was patently false.

In its posthearing brief Respondent states its reason for discharging Calabiao was ''she abandoned her station and allowed CNAs to also abandon her station at the same time on July 21.'' As I have found supra, this was the reason that Respondent belatedly gave to Calabiao on July 27, as the justification for its July 22 decision to terminate her employment. This could not have been Respondent's reason for discharging Calabiao, however, because, as I have found supra, at the time it decided to discharge Calabiao—sometime between 9:30 and 10:15 a.m. on July 22—Respondent had not learned that Calabiao had been away from her work station for a substantial period of time on July 21 and during at least a part of that time none of the CNAs assigned to the station had been there to attend to the patients.

Considering that the reason given to Calabiao for her discharge was a patently false reason; considering that at a later date Respondent belated advanced an entirely different reason to justify Calabiao's discharge; considering that the new reason could not have been the basis for Respondent's decision because when Respondent decided to discharge Calabiao it had no knowledge of Calabiao's alleged misconduct; considering Respondent's extraordinary haste in reaching its decision to discharge Calabiao; and, considering Respondent's unusual conduct in rushing to discharge Calabiao without conducting any kind of an investigation, contrary to its usual practice; I find that altogether these considerations establish

[38] The above description of what occurred on July 27 is based on Calabiao's undenied testimony.

that the reasons relied on by Respondent for discharging Calabiao are either patently false or pretextual in nature and not the real reasons for her discharge.

The suspensions of Baldoza, Llever, Mejia, and Ignacio

On July 21 Baldoza, Llever, Mejia, and Ignacio were employed by Respondent as CNAs on the p.m. shift.

As I have found supra, early in May employees employed on the p.m. shift began discussing the possibility of having the Union represent them. During May, June, and July, prior to July 21, Baldoza and Llever were among the p.m. shift employees who met on several occasions in the Company's parking lot to discuss the possibility of having the Union represent them. Mejia and Ignacio were also present at some of those meetings. Also, while in the employees' breakroom, Baldoza spoke to other employees on several different occasions about the possibility of having the Union represent them. Baldoza and Llever were among the employees who attended the Union's May 23 organizational meeting for the p.m. shift employees held at the home of p.m. shift employee Guzman.

On July 21, as I have found supra, P.M. Shift Supervisor Bagley discovered that all of the CNAs assigned to station 3 were in the employees' breakroom at the same time, leaving their patients without assistance or supervision. Bagley verbally reprimanded them for this conduct, which she characterized as a serious violation of nursing practice. Bagley promised, however, not to issue them a written reprimand because, she explained to them, if Respondent's management discovered what had occurred she feared it would constitute grounds for their termination.

On July 22, in the morning, Respondent decided to suspend Baldoza, Llever, Mejia, and Ignacio for 3 days for their July 21 conduct. As I have found supra, this decision was reached in less than 1 hour and before Respondent spoke to any of the employees, so as to give them an opportunity to explain what had occurred, and it was reached before Respondent spoke to P.M. Shift Supervisor Bagley about the events of July 21 and had gotten Bagley's recommendation.

On the morning of July 22, Boeger, Respondent's director of staff development, pursuant to the instruction of President M. Shenker, telephoned Baldoza and Llever at their homes to inform them of their suspensions. She told them they had been suspended from work for 3 days because they had abandoned their station for 45 minutes.

Baldoza's response to Boeger's message was to ask Boeger for permission to come to the facility to speak to Boeger and give his side of the story. Boeger denied the request; she told Baldoza he could only come to the facility after his 3 days' suspension.[39]

Llever's response to Boeger's message was to deny he had abandoned the station. He told Boeger it was Ignacio and Mejia who had not returned to the station at the end of the scheduled break period and that Charge Nurse Calabiao would confirm what he was saying. Boeger replied that Calabiao had been discharged.

According to the testimony of Administrator L. Shenker and Nursing Director Van Baren, Respondent's July 22 decision to suspend Baldoza, Llever, Mejia, and Ignacio was motivated by its belief that they had abandoned their work station. For the reasons hereinafter, I am persuaded that the Respondent's alleged belief that Baldoza, Llever, Mejia, and Ignacio had abandoned their work station on July 21 was not the real reason for its decision to suspend them, but was used by Respondent as a pretext to suspend them for some other undisclosed reason.

As I have found supra, what took place on July 21 was that Mejia and Ignacio abandoned their work station, when they failed to return to work at the end of their scheduled 30-minute break period, whereas Baldoza and Llever did not abandon their work station because they were only absent from the station during the 30 minutes allowed to them for their scheduled break period. The record also reveals, as I have found supra, that when Respondent decided to suspend Baldoza, Llever, Mejia, and Ignacio, it had no reasonable basis for believing that any one of them had abandoned their station, inasmuch as it was not until several hours after the decision had been made and communicated to the employees that Supervisor Bagley informed Respondent about the abandonment of the station.[40] In addition, the July 22 decision to suspend the four employees herein was made in an extraordinary rush and the manner in which it was made was contrary to the way in which Respondent, during the normal course of business, makes disciplinary decisions. As I have found supra, the decision was made in less than an hour after Respondent supposedly first learned of the alleged misconduct, it was made before Respondent spoke to any of the suspended employees about the misconduct attributed to them, so they could have an opportunity to explain what had occurred, and it was made before Respondent had even spoken to Supervisor Bagley about the events of July 21 and received Bagley's recommendation. Since Respondent normally conducts an investigation into employees' alleged misconduct, before deciding what, if any, discipline to impose, Respondent's unexplained rush to suspend the four employees herein constituted very unusual conduct.

In its unexplained rush to suspend the four employees, Respondent failed to even take the few minutes it would have taken to examine the employees' timecards, which would have shown when on July 21 the employees had punched out and then back in for their mealtime break. The timecards would have provided Respondent with persuasive evidence on the question or whether or not these employees had abandoned their work station by taking their meal break at the same time. Respondent offered no explanation for its failure to look at the employees' timecards. To the contrary, Administrator L. Shenker testified she was sure Respondent must have conducted such an investigation before reaching its decision to suspend the four employees because, as she testified, it would have been good policy to conduct such an investigation.

[39] This description is based on Baldoza's testimony. Boeger testified when she told Baldoza he had been suspended for abandoning his station, Baldoza responded by stating he felt the suspension was unfair, but did not explain why. I credited Baldoza's testimony, rather than Boeger's, because Baldoza's testimonial demeanor was good, whereas Boeger's was poor.

[40] Van Baren testified that the July 22 joint decision by herself and President M. Shenker to suspend Baldoza, Llever, Mejia, and Ignacio was based solely on the information Van Baren had received from Bagley.

On July 22 Llever went to Boeger's office between 2 and 2:30 p.m., when, in the presence of the Shenkers, Van Baren, Meagher, and Boeger, he asked why he had been suspended. Administrator L. Shenker replied he had been suspended for abandoning his station for 45 minutes. Llever denied having engaged in this conduct; he stated it was Mejia and Ignacio who had been guilty of abandoning the station for 45 minutes, not Llever. No one responded to Llever's assertion. Llever then stated he had to continue working because he could not afford the suspension. President M. Shenker responded that Llever could not return to work because he was suspended. President M. Shenker at this point switched topics. He stated that one of the Filipinos must have vandalized Bagley's motor vehicle. Llever informed President M. Shenker he had no knowledge of this. President M. Shenker then asked which one of the Filipinos had pulled the fire alarm earlier that week, referring to the fact that in or about the middle of July there had been a false fire alarm during the p.m. shift. Llever answered he did not know who had done this and explained that when the alarm sounded he was not in the vicinity of the alarm box. President M. Shenker remarked that one of the Filipinos must have been the guilty party because it happened on the p.m. shift. The meeting ended with President M. Shenker instructing Llever to remain in Boeger's office for the meeting between management and the p.m. shift that was to commence at approximately 2:45 p.m., the start of the p.m. shift.

Llever remained for the p.m. shift's meeting with management, which started at approximately 2:45 p.m. and ended at approximately 3:15 p.m. When the meeting ended President M. Shenker walked over to where Llever was standing and told him to return to work, that his 3-day suspension had been rescinded. Llever thanked him and went to work.

The above description of what occurred in Boeger's office during the July 22 meeting between Llever and Respondent's management and of what occurred between Llever and President M. Shenker when President M. Shenker later that afternoon told him that his suspension had been rescinded, is based on Llever's credible testimony. His testimony of what occurred during his meeting in Boeger's office with management was not controverted. His testimony, however, about what occurred when President M. Shenker notified him that his suspension was rescinded conflicts with President M. Shenker's testimony that after the July 22 meeting between management and the p.m. shift employees had ended, Llever walked over to where President M. Shenker was standing and stated he wanted to speak to Shenker, Shenker stated, ''[P]lease talk,'' Llever stated, ''I cannot afford to be suspended for three days,'' and, on hearing this, President M. Shenker told Llever his suspension was lifted. I rejected President M. Shenker's testimony and credited Llever's because President M. Shenker's testimonial demeanor was poor, whereas Llever's was good. Moreover, it does not ring true that President M. Shenker would rescind Llever's suspension based on his bare assertion that he could not afford to be suspended, especially when, as here, it is undisputed that President M. Shenker had ignored Llever's identical plea made less than 1 hour before.

President M. Shenker also testified that at the same time he told Llever his suspension was rescinded, he told Van Baren, who was standing right next to President M. Shenker, that ''I just lifted this gentleman's suspension,''[41] and Van Baren told President M. Shenker that since he had rescinded Llever's suspension Respondent would have to lift the suspensions of Baldoza, Mejia, and Ignacio, and that President M. Shenker instructed Van Baren to ''go ahead'' and rescind their suspensions. According to President M. Shenker, he did not instruct either Van Baren or Boeger to contact the employees who had been suspended earlier that day to tell them their suspensions had been rescinded because, as President M. Shenker testified, ''I wasn't involved in this anymore I just . . . instructed them to lift the other suspensions.''

Regarding the Respondent's decision not to rescind Mejia's, suspension, President M. Shenker testified that ''they'' came to him and ''suggested'' Mejia's, suspension not be rescinded because of her past record and President M. Shenker replied, ''[I]t's up to you.''

Van Baren's testimony concerning the events that resulted in Respondent's decision to revoke the suspensions of Llever, Baldoza, and Ignacio and not to do so in Mejia's, case, and the manner in which Respondent reached that decision, conflicts in certain significant respects with President M. Shenker's above testimony and is not corroborated by President M. Shenker's testimony. According to Van Baren, when President M. Shenker told Llever that his suspension had been rescinded, Van Baren was not close enough to hear what President M. Shenker said to Llever, contrary to President M. Shenker's testimony that she was standing right next to him. Van Baren also testified that when President M. Shenker told her he had rescinded Llever's suspension because Llever had stated he could not afford to be suspended, that Van Baren told President M. Shenker that since he had rescinded Llever's suspension that Van Baren would have to review the suspensions of Mejia, Baldoza, and Ignacio. This conflicts with President M. Shenker's testimony that at this time he instructed Van Baren to rescind Mejia's, Baldoza's, and Ignacio's suspensions.

Van Baren further testified that following President M. Shenker's instruction to review the suspensions of the other three CNAs, she conducted an independent evaluation of the decision to suspend Mejia, Ignacio, and Baldoza, and at an ''informal meeting'' held later during the afternoon of July 22, in Boeger's office, between herself, and the Shenkers and Boeger, that all four of them decided it would be appropriate to rescind the suspensions of Baldoza and Ignacio, and to let stand Mejia's, suspension, but it was Van Baren who had the final word in making this decision.[42] Neither the Shenkers nor Boeger corroborated Van Baren's testimony that such a meeting occurred and, as described infra, the testimony of

[41] President M. Shenker's testimony that when he spoke to Llever and told him his suspension had been rescinded, he did not know Llever's name is unbelievable, especially since it is undisputed that, as described above, less than an hour earlier, President M. Shenker, with other members of Respondent's management, met with Llever in Boeger's office.

[42] Van Baren testified her review of the personnel files of Baldoza and Ignacio uncovered no other ''major'' failings and that because of this and the fact that President M. Shenker had rescinded Llever's suspension, she felt it only fair to rescind Baldoza's and Ignacio's suspensions. According to Van Baren, her decision not to rescind Mejia's, suspension was based on the fact that her review of her personnel file revealed other ''writeups'' and that Mejia, was not an exemplary employee.

President M. Shenker and Boeger warrants the inference no such meeting ever occurred. Lastly, Van Baren testified she was the one who instructed Boeger to telephone Baldoza and notify him his suspension had been rescind, which is contrary to Boeger's testimony that President M. Shenker was the person who gave her that instruction, which is contrary to President M. Shenker's testimony that he gave no such instruction to either Van Baren or Boeger.

Boeger's testimony about the events that resulted in Respondent's decision to rescind Baldoza's suspension contradicts Van Baren's and President M. Shenker's above-described testimony. According to Boeger, it was Boeger, not Van Baren, who was standing next to President M. Shenker when he told Llever during the afternoon of July 22 that his suspension had been rescinded. Boeger further testified, contrary to the testimony of both President M. Shenker and Van Baren, that immediately after telling Llever his suspension had been rescinded that President M. Shenker turned to Boeger and told Boeger to telephone Baldoza and tell him his suspension had been rescinded and explained to Boeger that the reason he wanted Boeger to do this was because ''he [President M. Shenker] had revoked Llever's suspension.''

Boeger was confronted during cross-examination with an employee disciplinary notice found in Baldoza's personnel file dated July 22, signed by Boeger, which showed that on July 22 after writing on this notice that she had informed Baldoza he had been suspended, Boeger later that day added the following comment, ''after an in-depth discussion with Administration the decision was made to lift the suspension.'' Despite the plain language of this notation, Boeger testified no such discussion occurred in her presence. This is contrary to Van Baren's above testimony. Boeger further testified it was President M. Shenker who directed her to make this entry in Baldoza's disciplinary notice, which contradicts President M. Shenker's testimony that following his instruction to Van Baren to rescind the suspensions of Mejia, Baldoza, and Ignacio that ''I wasn't involved in this anymore.'' For if Van Baren is credited, he was involved in a later discussion with Van Baren, Administrator L. Shenker, and Boeger concerning this matter, and, if Boeger is credited, was so deeply involved in this matter so as to dictate the language contained in the disciplinary notice included in Baldoza's personnel file.

I reject in its entirety, the above testimony of President M. Shenker, Van Baren, and Boeger concerning Respondent's decision to rescind or not rescind the suspensions of Baldoza, Llever, Mejia, and Ignacio, and the manner in which this decision was reached. My principal reason for discrediting them is when they testified, the way each of them spoke, looked, and acted, and the tone of their voices, led me to conclude they were insincere and unreliable witnesses who were attempting to tailor their testimony to suit what they felt were Respondent's interests, in complete disregard of what actually occurred. This conclusion was reinforced in my mind when I reviewed the transcript and discovered the following: as described above, President M. Shenker, Van Baren, and Boeger contradicted one another on several significant matters; as described above, Van Baren's testimony on several significant matters was uncorroborated, when corroboration should have been readily available; and, as described above, President M. Shenker's reason for deciding to rescind Llever's suspension, which supposedly resulted in Respondent's subsequent decision to rescind Baldoza's and Ignacio's suspension, was implausible. It is for the foregoing reasons that I find that the reasons Respondent has advanced to explain its decision to rescind the suspensions of Baldoza, Llever, and Ignacio are not the real reasons for that decision.

On July 22, after being notified by Boeger he had been suspended for 3 days, Baldoza visited San Francisco where he remained for the next 5 days, inasmuch as he was not scheduled to work on July 25–26 and his suspension covered the period of July 22–24. During his absence there was no one at his residence to answer the telephone.

Boeger testified she telephoned Baldoza's residence on July 22, 23, and 24 for the purpose of notifying him that his suspension had been rescinded, but was unable to reach him. Baldoza's credible testimony, which was not disputed by Respondent, is that on his return to work on July 27 no one informed him his suspension had been rescinded nor was he ever informed by Respondent verbally or in writing that his suspension had been rescinded. It is also undisputed that in Baldoza's paycheck for the period that includes July 22–24, Baldoza was paid as if he had worked on those days, but the voucher attached to his check indicated his pay for those days had been treated by Respondent as sick leave pay charged to Baldoza's accrued sick leave benefits. It is also undisputed that during this pay period Baldoza had not been absent from work sick. Respondent offered no explanation for its failure to ever notify Baldoza that his suspension had been rescinded and why it treated his absences from work from July 22–24 as paid sick leave.

Based on the foregoing, and the allegations of the complaint, which admit Respondent only notified Llever and Ignacio of their suspensions, I find Respondent on the same day it notified Llever and Ignacio of their suspensions rescinded their suspensions. As to Baldoza's suspension, I find Respondent never notified him that his suspension was rescinded and while it paid him for the 3 days of work he missed due to his announced suspension, it was paid to him in the form of sick leave pay that was charged to his accrued sick leave benefits.

Ethel Tarrosa's discharge

On July 22, the day she was discharged, Tarrosa had been employed by Respondent as a CNA since 1986 and worked on the p.m. shift.

As I have found supra, on May 18 Tarrosa was suspended for 3 days for, among other things, being insubordinate to a charge nurse. As I have also found supra, Tarrosa was not placed on probation.

As I have found supra, prior to her May 18 suspension Tarrosa had been one of the employees employed on the p.m. shift who were discussing the possibility of having union representation. Following her May 18 suspension Tarrosa continued to speak with the other p.m. shift employees on a regular basis about the possibility of having the Union represent Respondent's employees and was one of the p.m. shift employees who attended the May 23 union organizational meeting at employee Guzman's home.

On July 21 Tarrosa worked on the p.m. shift at station 4 and was paired with CNA Abueg for the 30-minute lunchbreak. On July 21 Tarrosa and Abueg ended their lunchbreak and returned to work within the 30 minutes allowed for their break. The record also establishes that neither

Tarrosa nor Abueg acted insubordinate toward P.M. Shift Supervisor Bagley on July 21. Quite the opposite, Bagley credibly testified that during the events material to this case, which occurred on July 21, Bagley never even spoke to Tarrosa or Abueg.

On July 22 Tarrosa reported for work at her usual time, between 2:30 and 2:45 p.m. Previously that day she did not receive a telephone call at home from Respondent notifying her of her discharge. I reject President M. Shenker's testimony that during the morning he telephoned Tarrosa for the purpose of informing her she had been discharged. It is significant that President M. Shenker failed to testify what he supposedly told Tarrosa and what, if anything, Tarrosa said to him. I credited Tarrosa's testimony that she did not receive such a call, because her testimonial demeanor was good, whereas President M. Shenker's was poor.

On July 22, as Tarrosa was clocking in for work she was instructed by one of Respondent's clerical employees not to punch the timeclock, but instead to go to Boeger's office. There, Tarrosa found the Shenkers, Van Baren, Meagher, and Boeger waiting for her. Administrator L. Shenker began the meeting by asking if Tarrosa knew why she was there and, when Tarrosa answered, ''no,'' Administrator L. Shenker asked her to turn around and look a the fire alarm on the office wall and asked if that ''rang a bell,'' referring to the fact that earlier that month a false fire alarm had been rung during the p.m. shift. Administrator L. Shenker told Tarrosa a lot of people were saying Tarrosa was the person responsible for the false alarm, and asked if it was true. Tarrosa denied having engaged in that conduct and asked for the names of the persons who had accused her of doing this. Administrator L. Shenker did not respond. Instead she told Tarrosa to come to the facility the next day to pick up her paycheck. This ended the meeting. Previously, during the meeting, Administrator L. Shenker asked Tarrosa if she got along with P.M. Shift Supervisor Bagley and, when Tarrosa replied she got along just fine with Bagley, no more was said about this. No reason for Tarrosa's discharge was given during this meeting, other than what has been set forth above. Nor was Tarrosa given anything in writing that explained the reason for her termination.

The above description of what occurred during the July 22 meeting between Tarrosa and Respondent's management is based on Tarrosa's testimony. It was contradicted by the testimony of Administrator L. Shenker, Van Baren, and Meagher, as follows.

When asked what was stated during her July 22 meeting with Tarrosa, Administrator L. Shenker testified, ''[W]e told her her reasons for termination,'' but testified she was unable to remember whether it was herself or one of the other management representatives who informed Tarrosa of the reasons for her termination. When Administrator L. Shenker was asked, however, to state the reasons given to Tarrosa, she testified in terms that suggested it was Administrator L. Shenker who had given the reasons to Tarrosa. Administrator L. Shenker testified she told Tarrosa she had been discharged for ''the station abandonment'' and did not offer any other reason to Tarrosa for her discharge. She also testified that when she spoke to Tarrosa about her discharge, she informed Tarrosa she was still on probation and explained to Tarrosa that her conduct of abandoning the station was absolute grounds for termination because in the writeup that had resulted in Tarrosa being placed on probation, Tarrosa had been informed that any further misconduct during her probation period would be grounds for termination. Administrator L. Shenker further testified that the July 22 meeting ended with Tarrosa asking to be given the reasons for her termination in writing and, in response, Administrator L. Shenker gave Tarrosa a copy of a memo to the payroll department, signed by Administrator L. Shenker, which in substance contained language consistent with Shenker's above testimony.

Nothing was said to Tarrosa, according to Administrator L. Shenker's testimony, about Tarrosa being guilty of having rang the false fire alarm earlier that month. Van Baren testified, however, that during the meeting Shenker did question Tarrosa about the false fire alarm and Tarrosa responded by denying being the person who was guilty of engaging in that conduct. Van Baren also failed to corroborate Administrator L. Shenker's testimony that it was Tarrosa who initiated the meeting and that, at the end of the meeting, Tarrosa requested and was given the reasons for her termination in writing. Otherwise, Van Baren's testimony about this meeting corroborated Administrator L. Shenker's above-described testimony.

Meagher, when asked by Respondent's counsel what was ''discussed'' at this meeting, testified, ''Tarrosa was on was on probation for prior infraction and was facing possible termination'' and was terminated. Meagher did not testify about what was said or by whom.

I credited Tarrosa's testimony about the July 22 meeting and rejected the testimony of Administrator L. Shenker, Van Baren, and Meagher primarily because Tarrosa's testimonial demeanor was good, whereas the testimonial demeanor of Administrator L. Shenker, Van Baren, and Meagher was poor. In addition, Tarrosa's testimony was corroborated by Boeger's testimony that the reason why Tarrosa on July 22 was called to Boeger's office to meet with Respondent's management had ''something to do with the fire alarm.''[43] Boeger also testified that on July 22, prior to the meeting with Tarrosa, that one of the CNAs, whose name Boeger claims she was unable to remember, informed Boeger she knew it was Tarrosa who had rang the false fire alarm earlier that month, because she observed Tarrosa pulling the false alarm, and, on receipt of this information, Boeger immediately passed it along to one of the Shenkers.[44]

Also relevant in evaluating the testimony of Administrator L. Shenker is the absence of corroboration for certain portions of her testimony, when corroboration was readily available. Administrator L. Shenker's testimony that it was Tarrosa, not Shenker, who initiated the meeting, because Administrator L. Shenker was informed by Boeger and Van Baren that Tarrosa wanted to speak to her, was not corroborated by either Boeger or Van Baren.[45] Nor did either Presi-

[43] Boeger was present at the start of the July 22 meeting between Tarrosa and management, but shortly after the meeting began was instructed to leave the office for the purpose of quieting the p.m. shift that was waiting outside the office to meet with management as soon as the meeting with Tarrosa ended.

[44] I note there is no contention or evidence that Tarrosa was responsible for the false fire alarm.

[45] I also note that a review of the testimony of Administrator L. Shenker, Van Baren, and Meagher, about their July 22 meeting with Tarrosa, indicates that, according to them, Tarrosa said absolutely

dent M. Shenker, Van Baren nor Meagher corroborate Administrator L. Shenker's testimony that at the end of the meeting Tarrosa requested and was given the reasons for her termination in writing.

Van Baren testified that on the morning of July 22 President M. Shenker and Van Baren jointly decided to terminate Tarrosa for these reasons (Tr. 247):

> [D]ue to Bagley's oral report to me that Tarrosa was found in the breakroom during non-break time, with the other CNAs when she/they should be on the floor working (unauthorized break) and that Tarrosa was rude and uncooperative when Bagley told her to go back to work. The termination was also based on Tarrosa's probation status.

These reasons, which are the reasons advanced by Respondent for discharging Tarrosa, are completely without substance because, as I have found previously in this decision, Tarrosa was not in the breakroom during nonbreak time, Bagley did not tell Tarrosa to go back to work, Tarrosa was not insubordinate to Bagley, Tarrosa was not on probation, and Bagley did not inform Respondent that Tarrosa had engaged in the misconduct Van Baren claims Bagley attributed to Tarrosa. This complete lack of substance in the reasons advanced by Respondent for Tarrosa's discharge, when coupled with Respondent's failure to mention those reasons to Tarrosa when it notified her of her termination, convince me that the reasons advanced by Respondent for Tarrosa's termination are not the real reasons, but were used by Respondent as a pretext to justify Tarrosa's termination.[46]

Estella Abueg's discharge

Abueg, who was notified of her discharge on July 22, had been employed by Respondent as a CNA since 1988 and worked on the p.m. shift.

During the almost 4 years of her employment, Abueg was never disciplined by Respondent or told by Respondent her conduct had been unsatisfactory, except once she was told not to speak Tagalog.[47]

During the short time Bagley was Respondent's P.M. Shift Supervisor, prior to Abueg's discharge, Bagley was never critical of Abueg's work performance, and Abueg was never insubordinate to Bagley.[48]

On July 21 Abueg was scheduled to work at station 3, but switched work assignments with Lodring Ignacio. Because of this, on July 21 Ignacio worked at station 3 and Abueg worked at station 4.

As I have found supra, on July 21, while working at station 4, Abueg was paired with Tarrosa for the 30-minute lunchbreak and they returned to work from their lunchbreak within the 30 minutes allowed for the break. The record also establishes, as I have found supra, that on July 21 Abueg was not insubordinate to Bagley. In fact, Bagley credibly testified that during the events material to this case, which occurred on July 21, Bagley did not even speak to Abueg.

In July, prior to her termination, Abueg was among the p.m. shift employees who discussed the possibility of having union representation. Previously, on May 23, she was one of the p.m. shift employees who attended the Union's organizational meeting at employee Guzman's home. I considered that Abueg testified this meeting occurred on July 23, however, it is clear from the record it took place on May 23. Moreover, Tarrosa's and Bellon's credible testimony establishes Abueg was present at the May 23 organizational meeting.

Abueg, who, was not scheduled to work on July 22 or 23, received a telephone call on the morning on July 22 from President M. Shenker. He told Abueg to come to the facility to pick up her paycheck because she had been discharged. He explained she had been discharged for being absent from station 3 for 45 minutes and for refusing to obey the instructions of her supervisors. Abueg responded by stating she had not worked at station 3 on July 21, that she had not abandoned her station, and had not taken a 45-minute break period. She told President M. Shenker she intended to come to his office to discuss the matter. President M. Shenker replied there was no need for her to come to his office.

Disregarding President M. Shenker's instruction not to come to his office, Abueg went there on July 22, at which time President M. Shenker spoke to her in the presence of Administrator L. Shenker, Van Baren, Meagher, and Boeger.

President M. Shenker asked if Abueg knew what happened at station 3. Abueg stated she had no knowledge of what occurred there. President M. Shenker accused Abueg of taking a 45-minute break, of abandoning patients, and not obeying her supervisors. Abueg denied engaging in this conduct and once again stated that on July 21 she had worked at station 4, not station 3. President M. Shenker failed to respond to this, but at this point switched topics. He asked if Abueg knew anything about the following events: the July 21 vandalization of Bagley's motor vehicle; the false fire alarm that had been rung on the p.m. shift earlier that month; and, a sexual assault on a patient that also occurred earlier that month. Abueg answered she knew nothing about those matters. President M. Shenker stated he believed her and stated she was being placed on probation. He instructed her to check on July 23 with Respondent's staff coordinator, Ellen Perez, who is responsible for scheduling the CNAs, to see if she was scheduled to work.

Administrator L. Shenker then again asked if Abueg knew anything about what occurred on July 21 on the p.m. shift.

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nothing during this meeting that does not seem plausible, if, as Administrator L. Shenker testified, Tarrosa had requested the meeting.

[46] As I have found supra, when Administrator L. Shenker notified Tarrosa she was discharged, she indicated to Tarrosa that she was being discharged because Respondent believed she was responsible for having rung the false fire alarm earlier that month. Subsequently, shortly after Tarrosa's discharge, when her father Ben Medina, also employed by Respondent, questioned President M. Shenker about Tarrosa's discharge, it is undisputed that President M. Shenker told Medina that one of the reasons Respondent discharged Tarrosa was ''for pulling the fire alarm.'' There is no evidence whatsoever that Tarrosa was responsible for the false fire alarm. Therefore, it is not surprising Respondent does not now contend that one of the reasons for Tarrosa's termination was it believed she was responsible for the false fire alarm.

[47] Based on Abueg's credible testimony that was not contradicted by Respondent. Van Baren's testimony that Abueg's personnel file contained a counseling report dated May 30, 1990, which involved Abueg's failure to punch in properly when she returned from a break period, is the sole evidence offered by Respondent to controvert Abueg's testimony.

[48] Based on the credible testimony of Abueg and Bagley.

Abueg again answered in the negative and accused Administrator L. Shenker of always blaming the Filipino employees, even when they were not at fault. Administrator L. Shenker disputed this accusation.

The meeting ended with Nursing Director Van Baren informing Abueg she was on probation and should speak with Perez to find out what her work schedule would be.

The above description of Abueg's July 22 meeting with Respondent's management is based on Abueg's testimony. It was contradicted by the testimony of Administrator L. Shenker, summarized as follows.

Administrator L. Shenker testified that present at this meeting for management were only herself, Van Baren, and Meagher. She also testified she was unable to remember who spoke to Abueg on behalf of management; whether it was Administrator L. Shenker or Van Baren. According to Administrator L. Shenker, Abueg was once again informed of the reasons for her termination, Abueg began to cry and begged Administrator L. Shenker not to terminate her, Administrator L. Shenker refused to rescind the termination and explained to Abueg that she had been a party to very bad misconduct, the abandonment of the station. Administrator L. Shenker also testified she ended the meeting by informing Abueg she would conduct a further investigation into the matter and on July 23 give Abueg her final answer.[49]

I credited Abueg's above description of her July 22 meeting with Respondent's management because her testimonial demeanor was good, whereas Administrator L. Shenker's was poor and because President M. Shenker did not deny Abueg's testimony and the only witness Respondent called to corroborate Administrator L. Shenker's testimony, Assistant Nursing Director Meagher, was unable to do so; Meagher testified she was not able to remember what occurred at this meeting and, when asked if Abueg was disciplined in any way at this meeting, testified, ''to the best I can remember, I believe she was suspended for 3 days.'' Moreover, Van Baren's testimony that on July 22 Van Baren prepared an employee disciplinary notice recommending Abueg's termination, General Counsel's Exhibit 7(a), which she testified Administrator L. Shenker gave to Abueg during the July 22 meeting, in Van Baren's presence, does not square with Administrator L. Shenker's above testimony and conflicts with Administrator L. Shenker's further testimony, described infra, that it was a copy of a memo to Respondent's payroll department prepared by Shenker on July 24, General Counsel's Exhibit 7(b), which Shenker gave to Abueg and that she gave this document to Abueg on July 24, not on July 22. It is for all of the above reasons that I rejected Administrator L. Shenker's testimony and credit Abueg's.

Because July 23 was Abueg's regular scheduled day off from work, she did not check with Perez until the morning of July 24 to determine if she was scheduled to work, and was told by Perez she had not been scheduled to work. Perez advised her to speak to Boeger about the matter, which Abueg did immediately. Boeger told her that President M. Shenker had wanted to speak to her on July 23. Abueg stated President M. Shenker had not said this to her, but had instructed her to check with Perez to find out whether she was scheduled to work. Boeger told Abueg to come to the facility.

On the morning of July 24, when Abueg went to Boeger's office, Boeger handed her two paychecks and when Abueg observed one of the checks stubs stated she had been terminated, she asked Boeger for her ''termination papers'' and threatened not to leave the facility until she was given the reasons for her termination in writing. Shortly after, on July 24, Meagher gave Abueg a copy of a memo addressed by Administrator L. Shenker to Respondent's payroll department, dated July 24, which stated effective July 23 Abueg had been discharged for these reasons: ''insubordination to a nursing supervisor. Had been previously written up for insubordination and not following hospital policy and her job description.'' Administrator L. Shenker testified she prepared this memo on July 24, in response to Abueg's July 24 request that she be given the reasons for her termination in writing.

Van Baren testified that during the morning of July 22, Van Baren, President M. Shenker, Meagher, and Boeger met and jointly decided to discharge Abueg based on the information Bagley had given to Van Baren earlier that morning, which Van Baren testified was as follows: Abueg had taken unauthorized breaks and was not available for patient care, and when Bagley spoke to Abueg about this, Abueg was argumentative and would not listen to Bagley; this was not the first time Abueg had been insubordinate to Bagley; and, contrary to Bagley's instruction, Abueg had not gotten a patient out of bed for the patient's dinner. Van Baren further testified that on July 22, in deciding to discharge Abueg, Respondent also considered ''Abueg's prior discipline history'' and, in this regard, testified that although Abueg's personnel file contained no disciplinary notices or counseling reports since May 1990, that prior to July 21 Bagley had complained to Van Baren that Abueg had not followed Bagley's instructions and was taking extra breaktime that made her unavailable for patient care.

Administrator L. Shenker testified the ''main reason'' for Respondent's decision to discharge Abueg was she abandoned her station on July 21. Administrator L. Shenker testified the other reason for Abueg's termination was she did not take her break period on July 21, as it was scheduled, inasmuch as Bagley had reported that on July 21 all of the CNAs, including Abueg, were in the breakroom together. As described supra, the termination notice Respondent gave to Abueg that was signed by Administrator L. Shenker states she had been terminated for ''insubordination to a nursing supervisor'' and also stated she had been previously written up for insubordination and for not following hospital policy and her job description.

All of the above reasons advanced by Respondent for discharging Abueg are patently false because, as I have found previously in this decision: Abueg was not in the breakroom on July 21 during nonbreaktime and did not take more than the 30 minutes allowed for her break; on July 21 Bagley did not instruct Abueg to return to work; Abueg was not insubordinate to Bagley on July 21, nor at any other time during Bagley's employment as P.M. Shift Supervisor; Bagley did not inform Van Baren that Abueg had engaged in the misconduct that Van Baren claims Bagley attributed to Abueg; during the almost 4 years she was employed by Respondent, Abueg was never disciplined by Respondent or told by su-

[49] I note that Abueg specifically denied that Administrator L. Shenker stated she intended to conduct a further investigation into the matter.

pervision that her conduct was unsatisfactory; and, during the time Bagley was P.M. Shift Supervisor, Bagley was never critical of Abueg's work performance. The complete lack of substance in the reasons advanced by Respondent for Abueg's discharge convinces me that these reasons were not the real ones for Respondent's decision to discharge her, but were used by Respondent as a pretext to justify the termination.

b. *Discussion*

As I have found supra, on July 22 Respondent decided to discharge Calabiao, Abueg, and Tarrosa and decided to suspend Baldoza, Llever, Mejia, and Ignacio. As I have also found supra, the reasons Respondent advanced at the hearing and gave to these employees for this decision were not the real reasons, but were false and in large part completely without substance and were used by Respondent as a pretext to hide the real reason for its July 22 decision to discharge and suspend the seven employees. Considering the false and/or pretextual nature of the reasons advanced by Respondent to justify this decision, the question for me to decide is whether the whole record establishes that a motivating factor for Respondent's July 22 decision to discharge three and suspend four of its employees was to discourage the p.m. shift's Filipinos from supporting the Union's organizational campaign and/or to retaliate against them for having supported this campaign. I find that the following considerations support this conclusion:[50] all seven of the employees who, on July 22, Respondent decided to discharge or suspend were Filipinos who had participated in the Filipino employees' ongoing discussions about the possibility of having the Union represent them; Respondent knew the Union was engaged in a campaign to organize its employees and believed the Filipinos employed on its p.m. shift were union adherents; Respondent was hostile toward union representation and toward employees who supported union representation; Respondent believed that the Filipinos employed on its p.m. shift were ''troublemakers'' because they supported the Union's organizational campaign, and threatened to get rid of the ''problem'' of the Filipinos' support of the Union by discharging them; in deciding on July 22 to discharge and suspend seven Filipinos employed on its p.m. shift, Respondent acted in an inexplicable hurry; Respondent acted in such haste in making this decision that it failed to even consult with the employees' supervisor or to even speak to the employees involved before making the decision, contrary to its normal practice of conducting an investigation before deciding whether or not to discipline an employee. When these factors are considered with the false and/or pretextual reasons advanced by Respondent for its July 22 decision to discharge Calabiao, Abueg, and Tarrosa and to suspend Baldoza, Llever, Mejia, and Ignacio, I find they established that a motivating factor in the decision was to discourage the p.m. shift's Filipino employees from supporting the Union's organizational campaign and/or to retaliate against the employees because of Respondent's belief that they were adherents of the Union.[51]

Alternatively, I find that the above factors, plus Respondent's efforts to learn the identity of the Filipinos employed on the p.m. shift who were union adherents, when considered in their totality, are sufficient to create an inference that on July 22 Respondent knew that Calabiao, Abueg, Tarrosa, Baldoza, Llever, Mejia, and Ignacio were among the Filipinos employed on the p.m. shift who had been involved in the employees' ongoing discussions about having union representation and decided to discharge Calabiao, Abueg and Tarrosa and to suspend Baldoza, Llever, Mejia, and Ignacio, for that reason.

In concluding that the General Counsel has made a prima facie showing of the illegality of Respondent's July 22 decision to discharge three and suspend four of its p.m. shift employees, I considered that within a matter of hours after notifying employees Llever and Ignacio of their suspensions, that Respondent notified them that their suspensions had been rescinded. This does not, however, undermine the General Counsel's prima facie showing that the decision to suspend these two employees was unlawfully motivated. The inevitable and calculated effect of the message communicated by Respondent to the Filipinos employed on the p.m. shift by Respondent's notification that it had discharged and suspended the seven Filipino employees was to discourage them from supporting union representation. The fact that two of the suspended employees were later notified that their suspensions had been rescinded did not erase the message from the minds of the employees. Moreover, as I have found supra, the reasons advanced by Respondent for rescinding Llever's and Ignacio's suspensions were false, which lends further support to the conclusion that the decision to suspend them was discriminatorily motivated. In addition, Respondent's unexplained failure to ever inform Baldoza that his suspension had been supposedly rescinded lends further support to the conclusion that his suspension was unlawfully motivated.

Respondent does not assert any business reasons, other than the ones that I have found to be false and/or pretextual, for its July 22 decision to discharge Calabiao, Abueg, and Tarrosa and to suspend Baldoza, Llever, Mejia, and Ignacio, even absent the employees' union activity.[52] I, therefore, find that Respondent's discharge of Calabiao, Abueg, and Tarrosa on July 22, its suspension of Baldoza and Mejia, on July 22, and its notification to Llever and Ignacio of their suspension on July 22, violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint.

[50] The basis for the considerations set forth hereinafter have been previously explained in detail in this decision.

[51] It was not necessary for the General Counsel to demonstrate Respondent knew of the individual union sympathies of each of the employees, who, on July 22, Respondent decided to discharge and suspend. Rather, the General Counsel prevailed by demonstrating that Respondent had general knowledge of the union activity of the Filipinos employed on the p.m. shift, and decided to terminate and suspend seven of those employees in order to discourage union activity or retaliate against the union activity of some. *Guille Steel Products*, 303 NLRB 537 fn. 1 (1991).

[52] The law is settled that where, as here, it has been shown that the reasons advanced by the employer either did not exist or were not in fact relied on, there is no remaining predicate for a determination that the adverse action would have taken place even in the absence of union activity. *Wright Line*, 251 NLRB 1083, 1084 (1980); *Limestone Apparel Corp*., 255 NLRB 722 (1981); *Postal Service*, 275 NLRB 510 (1985).

4. Angelito Bellon's July 27, 1992 discharge

a. *The evidence*

Bellon, a Filipino, was employed by Respondent as a CNA on the p.m. shift from January 1990 until his July 27 discharge.

He was one of the Filipinos employed on the p.m. shift, who, early in May, began to discuss the possibility of having union representation and was among those who, on May 23, attended the union organizational meeting held at Guzman's home for the p.m. shift. Subsequent to that meeting, until his July 27 discharge, Bellon met often with others employed on the p.m. shift to discuss the possibility of union representation. These meetings took place at Respondent's facility as well as at employees' homes.

Bellon did not work on July 21. On July 22 he worked a double shift; the day shift, which ended at 3 p.m., and the p.m. shift, which had already started at 2:45 p.m. Also working a double shift with him that day was Jury Hitosis, another CNA, who, like Bellon, was regularly employed on the p.m. shift. Respondent's policy is that an employee who works a double shift must clock his timecard out at the end of the first shift and immediately clock back in for the second shift.

On July 22 at 3 p.m., the end of the day shift, Bellon and Hitosis were walking to the timeclock to clock out for the day shift and clock in for the p.m. shift, when Respondent's director of staff development, Boeger, shouted to them there was an emergency meeting of the p.m. shift being held in Boeger's office, which is also used as Respondent's classroom, and instructed them to go to the meeting immediately. Bellon replied that after they had clocked out and in they would immediately go to Boeger's office. Boeger responded by shouting words to the effect that Bellon and Hitosis should not worry about clocking out and in because Boeger or someone else would sign their timecards to verify their hours of work. Bellon and Hitosis ignored Boeger's instruction and continued to walk to the timeclock, which was between 80 to 100 feet from Boeger's office. After clocking their timecards, Bellon and Hitosis went immediately to Boeger's office.

The above description of what occurred on July 22, when Bellon and Hitosis ignored Boeger's instruction to go immediately to her office, is based on Bellon's testimony. Boeger's testimony of what occurred differs. She testified that Bellon and Hitosis on two separate occasions refused to obey her instruction to go immediately to the office for the meeting. She testified that when, as described above in Bellon's testimony, Bellon and Hitosis ignored her first request that they go immediately to the office for the meeting, Boeger went into the office, where the p.m. shift employees were gathered for the meeting, and the following occurred: when she entered the office, President M. Shenker asked if all of the employees were present; Boeger stated Bellon and Hitosis were on their way to the timeclock; President M. Shenker told Bellon ''to get them in here now''; Boeger walked out of the office and told Bellon and Hitosis, who were still on their way to the timeclock, to get into the office because, she explained to them, President M. Shenker wanted to start the meeting; Bellon turned around and ''waived'' at Boeger and both Bellon and Hitosis ignored Boeger's instruction and continued on their way to the timeclock; Boeger returned to the office and told President M. Shenker that Hitosis and Bellon would be there as soon as they punched their timecards; and, President M. Shenker, who said nothing, waited until Bellon and Hitosis came before he began the meeting.

I credited Bellon's testimony, rather than Boeger's, because Bellon's testimonial demeanor was good and Boeger's was poor. Moreover, President M. Shenker did not corroborate Boeger's testimony.

In rejecting Boeger's testimony, I considered it was corroborated, in part, by Administrator L. Shenker's testimony that on July 22 when Administrator L. Shenker entered Boeger's office at the start of the meeting, that Boeger stated she had told Bellon and Hitosis ''twice'' to come to the office and they had refused to follow her instruction. Administrator L. Shenker also testified that when Boeger said this, Administrator L. Shenker gave instructions for the meeting to begin without Bellon and Hitosis and it was not until after the meeting was in progress for approximately 5 minutes, that Bellon and Hitosis entered the office. Administrator L. Shenker's testimony, however, was not corroborated by Boeger and was contradicted in part by Boeger's testimony that President M. Shenker did not begin the meeting until Bellon and Hitosis arrived. Considering this, and considering Administrator L. Shenker's and Boeger's poor testimonial demeanor, and the failure of President M. Shenker to corroborate their testimony, I am of the opinion that Administrator L. Shenker and Boeger, in an effort to bolster Respondent's case, exaggerated Bellon's July 22 misconduct.

It is undisputed that immediately after management's July 22 meeting with the p.m. shift, Bellon was asked to remain in the office, at which time Administrator L. Shenker spoke to him about his failure to obey Boeger's instruction to immediately go to Boeger's office for the meeting. It is also undisputed that at this time Bellon apologized for his insubordination and that Administrator L. Shenker verbally reprimanded him for his insubordination. There is, however, a significant conflict between Administrator L. Shenker's and Boeger's testimony as to who spoke to Bellon about his insubordination.

Administrator L. Shenker testified that at the end of the p.m. shift's employees July 22 meeting with management, Boeger, and Administrator L. Shenker spoke to Bellon about his insubordination and Boeger ''wrote him up'' for his insubordination, in the form of an employee disciplinary notice (see Tr. 1926, 1928–1929). The employee disciplinary notice, Respondent's Exhibit 25, is an undated employee disciplinary notice signed by Boeger, on which Boeger wrote:

> [Bellon] refused to return to the classroom. When told by me that I would sign his card he disregarded what I had said and continued towards the timeclock. This is considered insubordination and unwilling to follow directions.

Administrator L. Shenker further testified Boeger explained to Bellon why he was being written up, and Bellon apologized to Boeger for being insubordinate to her. It was at this time, according to Administrator L. Shenker, that on the bottom of the employee disciplinary notice prepared by Boeger (General Counsel's Exh. 25), Administrator L. Shenker wrote, ''[Bellon] later acknowledged that he continued walk-

ing and apologized,'' and that in the section of the notice that described what, if any, disciplinary action was taken against Bellon, Administrator L. Shenker wrote that Bellon had been reprimanded ''verbally.''

Boeger contradicted Administrator L. Shenker's testimony concerning Boeger's involvement in Bellon's verbal reprimand. Boeger testified she was not able to remember when she prepared Bellon's disciplinary notice and admitted it might have been prepared on July 23, rather than on July 22, and denied she ever spoke to Bellon about his July 22 insubordinate conduct or ever gave Bellon a copy of the disciplinary notice. Indeed, Boeger professed an inability to remember what she did with the notice after having prepared it. This is one of the many instances in this proceeding when the testimony of a management representative on a matter of significance was not corroborated by the testimony of another management representative, when corroboration should have been readily available, but instead the representatives of management gave conflicting testimony. It is for this reason and because of Administrator L. Shenker's poor testimonial demeanor, that while I find that on July 22 Bellon was verbally reprimanded for his insubordinate conduct, I further find Boeger had nothing whatsoever to do with that reprimand, which was handled solely by Administrator L. Shenker, perhaps even to the extent of directing Boeger to prepare General Counsel's Exhibit 25, the disciplinary notice, at some point subsequent to July 22.

As described supra, it is undisputed that Hitosis and Bellon were equally insubordinate to Boeger on July 22, inasmuch as they both ignored Boeger's instruction to go immediately to Boeger's office for the meeting of the p.m. shift employees. It is also undisputed, however, unlike Bellon, Hitosis was not asked to remain in the office at the end of the meeting and, unlike Bellon, was not verbally reprimanded or otherwise disciplined for his insubordination. These conclusions are based on Administrator L. Shenker's testimony that Hitosis was not asked to remain in Boeger's office after the meeting of the p.m. shift for the purpose of being spoken to about his insubordination, and Shenker's further testimony that she did not know whether Hitosis was disciplined for his insubordination, but if he had been disciplined for that conduct Shenker would have been informed. Under the circumstances, absent evidence that Hitosis was disciplined for being insubordinate to Boeger on July 22, I find he was not verbally reprimanded or otherwise disciplined for engaging in that conduct. Respondent offered no explanation for its disparate treatment of Bellon.

On July 22, after having been verbally reprimanded by Administrator L. Shenker for being insubordinate to Boeger, Bellon worked the remainder of the p.m. shift as scheduled. He was supposed to work July 23 on the p.m. shift. On the morning of July 23, however, he telephoned the facility and told the desk clerk he would not be at work that day because he had a headache and was going to the Kaiser Permanente HMO for medical treatment.

Bellon was treated by one of Kaiser's doctors and, in connection with his visit, filled out and signed a one-page document entitled ''Initial Industrial Visit Questionnaire And Employer's Industrial Treatment Notice,'' Respondent's Exhibit 2, which, in the space reserved for his signature, states: ''Dear Employer: Please be advised I have selected this facility for the purpose of providing medical treatment to cure or relieve the effects of the injury described above.'' In the portion of the questionnaire that asked him to explain in detail what happened to him ''at work,'' which caused him to become ''ill or injured,'' Bellon wrote that during management's July 22 meeting with the p.m. shift employees, that the CNAs had been ''harassed'' and ''verbally abused,'' and Respondent's facility was ''understaffed'' and Bellon was under ''stress and pressure'' and as a result had a back pain and a severe headache.[53]

On July 24, in the morning, Boeger telephoned Bellon at home and told him that when he reported for work that afternoon to bring with him a note from his doctor, a ''doctor's certificate.'' Accordingly, when he went to work that day, Bellon took with him a note from the doctor who treated him the day before. He gave the note to Administrator L. Shenker, who met him in Respondent's lobby as he entered the facility to go to work. They did not discuss the contents of the note, which stated in substance that the physician had treated Bellon for a work-related illness or injury that involved a worker's compensation claim.

Bellon was not scheduled to work on July 25 or 26. On the morning of July 27 Administrator L. Shenker telephoned him at home and told him he had been discharged. She told Bellon he had been discharged for these three reasons: Bellon had received ''three writeups''; Bellon was not obeying the facility's policy and regulations; and, Bellon had been insubordinate to Boeger. Administrator L. Shenker told Bellon to come to the facility that day, after 3 p.m., to pick-up his paycheck.

When Bellon went to the facility that afternoon for his paycheck, he asked Administrator L. Shenker to give him the reasons for his discharge in writing. Shenker told him she was too busy that day to do this, but asked him to return the next day. The next day, July 28, when Bellon returned to the facility he was told by the front desk clerk to go to the office, where he found the Shenkers and Van Baren. Administrator L. Shenker gave him his ''termination papers'' and told him one of the reasons he was terminated was for going to Kaiser Permanente instead of to Martin Stuart, Respondent's doctor, who she stated was the doctor who care for Respondent's employees. Shenker stated the other reasons for his termination were that he had been insubordinate to Boeger and had received a ''writeup'' for his lack of ''in service.'' This refers to the educational meetings that Respondent's employees are required to attend, where Respondent explains to them the Company's policies and the regulations governing their conduct.

Regarding Administrator L. Shenker's statement to Bellon that one of the reasons for his termination was he had gone to a Kaiser HMO physician on July 23 for treatment, rather than to Dr. Stuart, Respondent's physician, the record reveals the following. Respondent's director of staff development, Boeger, testified that during the time material Respondent's policy covering employees' workers' compensation claims was set forth in Respondent's Exhibit 22 and that in explain-

[53] This questionnaire on its face indicates it consisted of two carbon copies, as well as the original, and that the original is sent to Bellon's employer, that one copy is included in Bellon's medical record at Kaiser, and the remaining copy is retained by Kaiser's industrial/business office. Bellon was not given a copy of the questionnaire. The record does not show when Respondent received its copy of the questionnaire.

ing the Company's workers' compensation procedure and policy to new employees during their orientation period, Boeger used the language set forth in Respondent's Exhibit 22. Boeger's and Administrator L. Shenker's testimony, which is uncontroverted, is that during the time material, Respondent's Exhibit 22 was posted at Respondent's facility on the bulletin board in the employees' breakroom. Respondent's Exhibit 22 reads as follows:

November 13, 1991

TO: All Dept. Supervisors
FROM: Administration
REF: WORKMAN'S COMPENSATION

It is our policy that everything possible will be done to protect employees from injuries.

Safety is a cooperative understanding requiring participation by every employee.

If an injury does occur, please follow the following procedures:

1. IMMEDIATELY INFORM SUPERVISOR

2. ASK FOR AND COMPLETE AN INCIDENT REPORT

3. SUPERVISOR WILL INVESTIGATE INJURY (witness, reasons) & DOCUMENT ON REPORT FORM

4. FORM WITH EMPLOYEE IS TAKEN TO DEPT. SUPERVISOR

5. DEPT. SUPERVISOR INVESTIGATES INJURY, DOCUMENTS AND DECIDES IF PHYSICIAN IS NEEDED.

6. IF PHYSICIAN IS NEEDED:

MONDAY-FRIDAY—referred to Assistant Administrator 8:30 a.m.–5:00 p.m. for appt. and completion of other forms.

Employee will be sent to:

DR. MARTIN STUART
401 GREGORY LN.
PLEASANT HILL, CA 94523
685–9146

5:00–9:00 p.m. Daily & 9:00 a.m.–9:00 p.m. Weekends

SUN VALLEY URGENT CARE MEDICAL CENTER
1100 CONTRA COSTA BLVD.
CONCORD, CA
825–2000

7. In an *emergency* where the condition requires immediate care, the *supervisor* may decide to send employee to Emergency Room of Mt. Diablo Medical Center, when the above facilities *cannot be reached*.

8. BE SURE TO SEND A TREATMENT AUTHORIZATION FORM WITH EMPLOYEE.

9. All employees must use the above policy for the first 30 days, per state requirement. Any request to see the employees personal physician must be arranged when hired.

Laura F. Smith, Assistant Administrator

Van Baren, Respondent's director of nurses, testified that once or twice a year, at educational meetings, also known as ''in service'' meetings, Respondent usually explained to its employees the procedure they were suppose to follow regarding medical treatment for work-related injuries. Van Baren did not, however, testify who conducted those meeting or what was stated to the employees on that subject, and, as described supra, Boeger testified it was the language contained in the posted notice, Respondent's Exhibit 22, which Boeger read to new employees during their orientation. The management representative who was the most competent person to testify for Respondent about its workers' compensation policy and procedure, Assistant Administrator Laura Smith, who administers it, was not called by Respondent to testify although she is still in its employ. In short, the record as a whole fails to establish that during the time material, when Respondent informed its employees about its workers' compensation policy, that it told them anything other than what was contained in the posted notice, Respondent's Exhibit 22.

Regarding Bellon's testimony that Administrator L. Shenker told him one of the reasons for his discharge was due to the ''writeups'' he had received, the sole evidence of ''writeups'' received by Bellon during the 2-1/2 years of his employment, is Administrator L. Shenker's testimony that when she decided to discharge Bellon she relied, in part, on the following ''writeups,'' which she testified were in Bellon's personnel file: Respondent's Exhibit 37(e), an employee disciplinary notice dated October 18, 1990; and, Respondent's Exhibits 37(c), (d), and (f), Employee counseling reports respectively dated September 24, 1990, February 12 and December 26, 1991. The aforesaid documents were received in evidence, not for the truth of the matters contained therein, and no evidence was presented that in fact Bellon was either counseled or disciplined for the conduct set forth in those documents or engaged in that conduct.

The above ''writeups'' read, in substance, as follows: the September 24, 1990 counseling report states Bellon was counseled for having been late for work on three occasions, without supervision's approval, and without having notified supervision he would be late; the October 18, 1990 Disciplinary Notice states Bellon had been issued a written reprimand for behaving in an inappropriate and discourteous manner toward his supervisor and had been warned that if he did not cease this type of conduct immediately he would be terminated; the February 12, 1991, counseling report stated Bellon was counseled for having left one of his patients ''unchanged and wet'' for a period of almost 3 hours; and, the counseling report dated December 26, 1991, states Bellon was counseled for not having met the ''inservice requirement of 24 hours per year,'' and states Bellon would be unable to renew his license as a CNA if he did not have 48 hours of ''inservice'' over a 2-year period and would have to get at least 2 hours of ''inservice'' each month or face suspension.

In summation, at the time of his discharge, in his more than 2-1/2 years of employment with Respondent, Bellon had been disciplined twice; in October 1990 he received a written reprimand for being discourteous to his supervisor and on July 22 was verbally reprimanded for being insubordinate to Boeger. [54] Yet, on its receipt of Bellon's doctor's excuse that

[54] As I have found supra, in deciding whether to discipline nursing department employees, Respondent uses a progressive system of dis-

indicated he had gone to a Kaiser physician for treatment concerning a work-related injury or illness, rather than to Respondent's physician, Respondent abruptly decided to discharge him, without even first questioning him or affording him an opportunity to relate his version of what occurred. Since there is no evidence or contention that Bellon had previously engaged in similar conduct, and considering that Bellon's personnel file revealed to Respondent that in his 2-1/2 years of employment Bellon had only been disciplined for conduct having no relationship whatsoever to his failure to seek medical treatment from Respondent's doctor, and considering that his discipline consisted of merely a written and a verbal reprimand and that the written reprimand was issued 1-3/4 years prior to his discharge, it is clear that in abruptly discharging Bellon Respondent failed to follow its usual system of progressive discipline.

Respondent's administrator, L. Shenker, testified that on receipt of the doctor's excuse from Bellon on July 24, which indicated he had gone for medical treatment for a work-related injury or illness on July 23 to a Kaiser HMO physician, rather than to Respondent's physician, Respondent decided to discharge Bellon for engaging in this conduct, as well as for having been ''written up'' several times in the past, including his last writeup for being insubordinate to Boeger. Administrator L. Shenker further testified that what ''caused'' Respondent to discharge Bellon was his failure to go to Respondent's physician on July 23 for medical treatment, instead of Kaiser (Tr. 1925, R. Exh. 37–B). Conflicting with this testimony is Administrator L. Shenker's later testimony, given during cross-examination, that Administrator L. Shenker discharged Bellon because he acted insubordinate to Boeger, when on July 22 he failed to obey Boeger's instruction to go immediately to the meeting of the p.m. shift employees (Tr. 1952, 1972). This testimony is consistent with a memo from Administrator L. Shenker to Respondent's payroll department dated July 27 that states, in substance, that the incident that triggered Bellon's discharge was his insubordination toward Boeger. [55] It is also consistent with Boeger's testimony that Van Baren and Administrator L. Shenker ''jointly'' decided to discharge Bellon because on July 22 he was insubordinate to Boeger (Tr. 362–363; G.C. Exh. 14).[56] Administrator L. Shenker's and Boeger's testimony, however, that it was Bellon's insubordinate conduct to Boeger on July 22 that triggered Respondent's decision to discharge him is patently false because it is undisputed that Administrator L. Shenker on July 22 only gave Bellon a verbal reprimand for his insubordinate conduct. Clearly, if Respondent viewed Bellon's insubordination as sufficiently serious to warrant his discharge it would have given him more than merely a verbal reprimand for this conduct.

I reject in its entirety Administrator L. Shenker's testimony about Respondent's reasons for discharging Bellon and find those reasons were not the real ones, but were used by Administrator L. Shenker as a pretext to hide the real reason. Administrator L. Shenker's poor testimonial demeanor and the following additional considerations, discussed in detail supra, taken together, led me to these conclusions: Administrator L. Shenker's testimony concerning the way in which Respondent's decision to discharge Bellon was reached and the reasons for that decision was not corroborated by either Van Baren or Boeger, who, according to Administrator L. Shenker discussed the decision with Shenker; Hitosis and Bellon were both equally insubordinate to Boeger on July 22, yet Administrator L. Shenker disciplined only Bellon and failed to explain the reason for this disparate treatment; Administrator L. Shenker offered shifting, conflicting and, in part, completely implausible reasons for Bellon's discharge; in deciding to discharge Bellon, Administrator L. Shenker unexplainably failed to follow Respondent's usual system of progressive discipline, and failed to afford Bellon the opportunity to explain why, on July 23, he visited a Kaiser physician for medical treatment for a work-related injury or illness, rather than Respondent's physician; and, Administrator L. Shenker failed to follow her usual practice of not involving herself in the discipline of employees,[57] but, as I have described supra, for unexplainable reasons she personally issued Bellon a verbal reprimand for being insubordinate to Boeger and subsequently personally decided to discharge Bellon and personally notified Bellon of his discharge and prepared virtually all of the paperwork connected with the discharge.

b. *Discussion*

As I have found supra, Bellon was one of the Filipino employees employed by Respondent on its p.m. shift who regularly met with other Filipinos on that shift to discuss the possibility of union representation. I am of the opinion that the record as a whole establishes Respondent was aware of Bellon's union sympathy and activity and on July 27 discharged him for that reason. The several factors which, when viewed in their totality, led me to this conclusion, are as follows:[58] Respondent knew the Union was engaged in an organizational campaign and that a significant number of its p.m. shift Filipino employees were union adherents; Respondent was attempting to discover the names of the Filipinos employed on the p.m. shift who were union adherents; Respondent was extremely hostile towards the Filipinos employed on its p.m. shift who were union adherents because they were union adherents; Respondent did not follow its usual system of progressive discipline when it discharged Bellon, but deviated from that system; Bellon was the victim

cipline under which employee counseling reports are not considered a form of discipline and for this reason are not relied on by Respondent in deciding whether to discipline employees.

[55] The July 27 memo, R. Exh. 37–A, states the reason for Bellon's discharge was that ''employee written up several [times] for not following hospital policy and procedures. *Final incident involved insubordination to a licensed supervisor*.'' (Emphasis added.)

[56] I also note that while Boeger testified that the decision to discharge Bellon was jointly made by Van Baren and Administrator L. Shenker, that Shenker's testimony was to the effect that the decision was Shenker's decision that she discussed with Van Baren and Boeger (Tr. 1930–1931). Van Baren was not called by Respondent to corroborate Administrator L. Shenker's testimony of how the decision to discharge Bellon was reached or the reasons for that decision, and, as noted supra, Boeger's testimony concerning Respondent's reason for discharging Bellon conflicts in certain significant respects with Shenker's.

[57] Administrator L. Shenker testified it is Respondent's department heads who are responsible for discipline of employees and Shenker only rarely becomes involved in such matters and then only to discuss the problem with the department head (Tr. 1895–1896).

[58] The basis for each of these factors has been set forth in detail previously in this decision.

of disparate treatment; Respondent advanced different reasons for Bellon's discharge, some of which were in conflict and implausible; and, all of which were pretextual—they were not the real reason for Bellon's discharge, but were used by Respondent as a pretext to hide the real reason. Altogether these factors are sufficient to create the inference that Respondent was aware of Bellon's union activity and sympathy and discharged him for that reason. I, therefore, conclude that the General Counsel has established that Respondent's animus toward Bellon because of his union sympathy and activity was a motivating factor for Respondent's decision to discharge him.

Respondent does not assert any business reason, other than the ones that I have found were pretextual, for discharging Bellon even if he had not engaged in his union activity. I, therefore, find Respondent's discharge of Bellon on July 27, 1992, violated Section 8(a)(1) and (3) of the Act.

5. Respondent's alleged failure, commencing in mid-July, to offer overtime work to Benjamin and Emma Media

The complaint alleges that in or about June 1992 Respondent violated Section 8(a)(3) and (1) of the Act by ceasing to offer overtime work to employees Benjamin and Emma Media. I find that the General Counsel has failed to establish that Respondent ceased offering overtime work to the Medinas, and for this reason shall recommend that the allegation be dismissed.

Benjamin Medina has been employed by Respondent as a CNA on the day shift since October 1991. His wife, Emma Medina, is also employed by Respondent as a CNA on the day shift.

During the last week of July approximately 10 of Respondent's employees attended a union organizational meeting held at the Medinas' home. There is no evidence the Medinas engaged in union activity prior to that meeting or otherwise expressed prounion sentiments. Subsequently, during August and September, prior to September 22, employees of Respondent attended three other union organizational meetings held at the Medinas' home.

Benjamin Medina testified that during 1992, prior to July, he and his wife occasionally worked for Respondent on one or more of their scheduled days off. CNAs who wanted this ''extra work'' gave their names to Ellenita Perez, Respondent's staff coordinator, and when Respondent needed CNAs for this extra work, Perez contacted them.

Benjamin Medina further testified that beginning in about mid-July and continuing until January 1993, Perez ceased offering him or his wife the opportunity to work on their days off, even though they had informed Perez they were available for the extra work.

Perez contradicted Benjamin Medina's above testimony. She testified that during the summer of 1992 on more than one occasion she spoke to both Benjamin and Emma Medina and asked them to work an extra day on their day off and they refused to do so, and that eventually she ceased asking them to work on their days off because of these refusals.

I credit Perez' and reject Benjamin Medina's testimony because Perez' testimonial demeanor was better than Medina's and because the General Counsel failed to call Emma Medina to corroborate her husband's testimony, thus warranting the inference her testimony would have been adverse to the General Counsel's case.

Having found, supra, that Respondent did not cease offering overtime work to Benjamin and Emma Medina, as was alleged in the complaint, I shall recommend that this allegation be dismissed.

6. The September 4, 1992 suspension of Irineo Llever

a. *The evidence*

Llever is one of the Filipinos employed as a CNA on the p.m. shift. He began work for Respondent in October 1990.

Llever was among the p.m. shift's Filipinos who met on a number of occasions during May through July to discuss the possibility of having the Union represent them. In addition, as I have found supra, during the last week of July several of the p.m. shift employees, including Llever, began to wear a union button on their uniforms while at work. The button was approximately 2 inches in diameter and read ''Yes For Union.''

As I have found supra, on July 22 Respondent notified Llever he had been suspended for 3 days and, as I have also found supra, Respondent's decision to suspend him was motivated by its desire to discourage Llever and the other Filipinos employed on the p.m. shift from supporting the Union's organizational campaign.[59]

On September 4, Llever was again suspended from work by Julia Boeger, Respondent's director of staff development. When Llever came to work that afternoon he was not allowed to clock in. Instead he was instructed to go to Boeger's office. Boeger told him he had been suspended for 3 days. In support of her decision to suspend Llever, Boeger showed him three employee counseling reports dated August 28, September 1, and September 2.

The August 28 counseling report was signed by Charge Nurse Eva Rivera and stated the reason for the counseling was Llever had ''harassed'' Rivera, and described the alleged harassment. The September 1 counseling report was also signed by Rivera and stated the reason for the counseling was Llever had been ''insubordinate'' to Rivera and described the alleged insubordination. The September 2 counseling report was signed by Charge Nurse Amore Santiago and stated the reason for the counseling was Llever had been insubordinate to Santiago, and described the alleged insubordination.

Llever told Boeger that he had not harassed or been insubordinate to either Rivera or Santiago, as alleged. He also explained to Boeger what had occurred between himself and Rivera and between himself and Santiago on the occasions described in the reports, and told Boeger he should not be suspended for his conduct. Boeger responded by instructing Llever to leave the premises immediately because his suspension started that day. Llever pointed out that Respondent had not telephoned him at home and informed him of his suspension, so he had come to work, and, because of this, Llever asked Boeger to allow him to work that day and start his suspension the next day. Boeger refused, and when Llever insisted he be allowed to work that day since he was already there, Boeger threatened to telephone the police and have

[59] As I also found supra, President M. Shenker thereafter rescinded Llever's July 22 suspension.

him physically removed from the facility. Llever at this point left the facility, escorted by Boeger, who told him that if he wanted to return to work he could do so on September 9. Llever replied that being suspended from September 4 to September 9 was longer than a 3-day suspension. Boeger answered, as Llever credibly testified, ''[I]f you wish to come back to work, come back on the 9th. If you don't want to, I appreciate it, because actually we are firing Filipinos.''[60]

Prior to being notified on September 4 of his suspension, Llever had not been shown any of the above-described employee counseling reports, nor had Charge Nurses Rivera nor Santiago or any one from supervision previously discussed the contents of those reports with Llever.

Boeger testified that on September 4 charge nurses Rivera and Santiago gave Boeger the above-described employee counseling reports and based on the contents of those reports she decided to suspend Llever from work for 3 days. Boeger testified her purpose in speaking to Llever on September 4 was not to give him an opportunity to explain or defend himself before she decided whether or not to discipline him. More specifically, Boeger testified her decision to suspend Llever was made before she spoke to him and was intended to be a final decision regardless of Llever's explanation.

Boeger also testified that because the charge nurses were upset when they spoke to her on September 4 about Llever's conduct and because of Boeger's past personal ''experiences'' with Llever, that Boeger decided to suspend Llever before giving him an opportunity to explain or defend himself. When asked to describe her past personal ''experiences'' with Llever, Boeger testified ''[H]e has a poor working attitude.'' When pressed to be more specific about Llever's past misconduct and when it took place, Boeger testified, ''I just don't know. It was before these writeups, and I experienced with Llever in the hallway when another CNA asked him to help lift [a patient] . . . and he just walked away,'' because it was not his patient. When asked to describe her other personal ''experiences'' with Llever, Boeger testified, ''[J]ust encounters in the hallway,'' which she was not able to recall, and when asked to give her best recollection of those ''encounters,'' testified ''[I]t's just when you say something to him he always has a comment to come right back to you and twist everything around or I can't remember word for word . . . it had to do with work because we were at work. I can't say anymore.'' Boeger's testimonial demeanor was poor when she gave the aforesaid testimony; it was not the demeanor of a sincere witness whose memory lapse had been caused by the passage of time.

There is no evidence that prior to September 4 Boeger ever spoke to Llever critically about his attitude or his work performance. Admittedly, prior to September 4, Boeger never issued to Llever or placed in his personnel file an employee disciplinary notice or an employee counseling report. When asked why she had never documented Llever's prior misconduct, Boeger testified, ''I just stored it up here [referring to her head]. *I don't know*.'' (Emphasis added.)

I reject in its entirety Boeger's above testimony about her reasons for not giving Llever a chance to explain or defend himself before she decided to discipline him. Boeger's testimonial demeanor was poor and, as described supra, except for the one instance where Llever, in her presence, supposedly refused to assist another CNA, Boeger was vague and evasive when asked to describe her past personal experiences with Llever that led her to conclude that he deserved to be disciplined summarily without having a chance to defend himself. Moreover, if Boeger in the past, as she testified, had ''experiences'' with Llever that demonstrated to Boeger that Llever had a bad attitude or was otherwise not conducting himself in a satisfactory manner, it is inconceivable that Boeger would not have documented this conduct in the form of a disciplinary notice or at the very least have issued an employee counseling report for Llever's conduct. It is for the aforesaid reasons that I find Boeger had no valid reason for not giving Llever a chance to explain or defend himself before deciding to suspend him.

b. *Discussion*

As I have found supra, Respondent's decision to suspend Llever on September 4 was made by Boeger, who supposedly made this decision because of the conduct attributed to Llever in the three counseling reports Boeger supposedly received on September 4 from Charge Nurses Rivera and Santiago. Also, as I have found supra, Boeger summarily decided to suspend Llever without giving him a chance to explain or otherwise defend himself against the allegations contained in the counseling reports.

In view of the above circumstances, it is clear that in deciding to suspend Llever, Respondent deviated significantly from the way it normally decides whether or not to discipline nursing department employees. Respondent's director of nurses, Van Baren, not Boeger, is responsible for disciplining the employees in the nursing department. It is Van Baren to whom the charge nurses, shift supervisors, or department heads submit employee disciplinary notices or employee counseling reports, and it is Van Baren who decides whether or not employees shall be disciplined and, if so, the type of discipline. Also, in deciding whether to discipline employees, Respondent uses a progressive system of discipline under which employee counseling reports are not considered as a form of discipline and for this reason are not relied on by Respondent in deciding whether to discipline employees. It is also undisputed that before deciding whether to discipline employees, Respondent's policy is to give accused employees a chance to explain or defend themselves against the allegations of misconduct.

Here, the decision to suspend Llever was not made by Van Baren who usually makes decisions involving employee discipline. It was made by Boeger, who does not normally, if ever, decides whether an employee should be disciplined, and who, in deciding to suspend Llever, deviated from Respondent's usual system of progressive discipline inasmuch as her decision to suspend Llever was based solely on information contained in counseling reports, which are not normally regarded by Respondent as a form of discipline, and Boeger further deviated from Respondent's usual practice by summarily deciding to suspend Llever without giving him an opportunity to explain the misconduct attributed to him. Also relevant in evaluating the bona fides of Boeger's reasons for suspending Llever is Respondent's failure to explain why, if Charge Nurses Rivera and Santiago were so upset about the conduct set forth in the counseling reports, they never both-

[60] Boeger denied making the above remark. I rejected her testimony because Llever's testimonial demeanor was better than Boeger's, which was poor.

ered to speak to Llever about this conduct and delayed giving the counseling reports to management. In this last regard, the employee counseling reports that Boeger testified were given to her by Rivera and Santiago on September 4 were dated August 28, September 1, and September 2. Boeger offered no explanation for Rivera's and Santiago's delay in submitting the reports to management. Nor did Boeger explain why these reports were not submitted to Van Baren, the head of the nursing department, or Van Baren's assistant, Meagher, rather than to Boeger.

The aforesaid circumstances, in their entirety, when coupled with Boeger's poor testimonial demeanor that gave me the impression she was more interested in tailoring her testimony to suit Respondent's case, rather than the truth, have persuaded me to reject her testimony concerning her decision to suspend Llever and to conclude that Boeger's use of the allegations contained in the counseling reports to suspend Llever was a pretext designed to conceal Respondent's real reason for the suspension. I further find that the record as a whole warrants the conclusion that it was Llever's union activity that was the motivating factor for Llever's September 4 suspension.

As I have found supra, commencing in the last week of July, Llever wore to work on his uniform a union button stating, ''Yes For Union,'' thereby putting Respondent on notice he was actively soliciting other employees to support the Union's organization campaign. That Respondent was hostile toward Llever because of his activity on behalf of the Union is evident from the several unfair labor practices that I have found to have been committed by Respondent prior to Llever's September 4 suspension, including my finding that when, on July 22, Respondent notified Llever he had been suspended from work, it did so for the purpose of discouraging him and the other Filipinos employed on the p.m. shift from supporting the Union's organizational campaign. The foregoing circumstances, coupled with the pretextual nature of Llever's September 4 suspension, persuades me that the General Counsel has established that Respondent's animus toward Llever because of his union activity was a motivating factor for Respondent's decision to suspend him on September 4, 1992.

Respondent does not assert any business reason, other than the ones that I have found were pretextual, for suspending Llever if he had not engaged in his union activity. I, therefore, find that Respondent's suspension of Llever on September 4 violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

7. Respondent disciplines Benjamin Medina on September 22 and October 26, 1992, January 28, and March 22, 1993

Medina is employed by Respondent as a CNA on the day shift. He has been employed in this capacity since the first week of October 1991. His wife, Emma Medina, is also employed by Respondent.

During the last week of July, approximately 10 of Respondent's employees attended a union organizational meeting held in Medina's home. Thereafter, during August and September, prior to September 22, three more union organizational meetings were held in Medina's home for the employees.

Prior to September 22, during the 11-1/2 months of his employment, Medina did not receive a written reprimand and there is no evidence or contention he had been otherwise disciplined or counseled. On September 22, 3 days before the September 25 representation election, he received his first written reprimand and subsequently, on October 26, 1992, January 28, and March 22, 1993, received additional written reprimands and on March 22, 1993, was suspended for 5 days

a. *Medina's September 22 discipline*

(1) The evidence

As I have found supra, during the time material, Respondent's workers' compensation claim policy was set forth in a memo addressed to its department supervisors posted on the bulletin board in the employees' breakroom. The memo, Respondent's Exhibit 22, quoted in its entirety supra, reads in substance as follows. If an ''injury occurs, despite Respondent's policy to do everything possible to protect its employees from work related injuries, the injured employees must follow this 'procedure''': inform a supervisor who will give the employee an incident report form to fill out; after investigating the injury and writing up an investigative report, the supervisor will take the employee and the employee's incident report to the department supervisor; the department supervisor will investigate the injury and review the documents and decide if the employee needs to see a physician; if the department supervisor decides the employee needs to see a physician; and it is during the hours of 8:30 a.m. to 5 p.m., the employee must go to Assistant Administrator Laura Smith who will arrange for the completion of the necessary paper work and arrange for the employee to be treated by Dr. Martin Stuart. The memo concludes by stating that ''all employees must use the above policy for the first 30 days, per state requirement'' and states that ''any request to see the employees' personal physician must be arranged when hired.''

On September 20, while at work, Medina told the Charge Nurse responsible for his work station he was experiencing pain in his back and chest that might make it impossible for him to finish his shift that day. That evening he had an upset stomach and diarrhea. The next morning, September 21, Medina went to the Kaiser Permanente HMO for medical treatment, after having first informed Respondent he would not be at work because of an upset stomach and diarrhea.

During his September 21 visit to the Kaiser HMO doctor, Medina told the doctor about his above-described symptoms, including the pain in his back and chest. Medina's back and chest at that time were X-rayed and he was also given an EKG. After examining the results of the X-ray and the EKG, the doctor told Medina there was nothing wrong with his back or heart. Then, after questioning him about his work environment, the doctor stated he was of the opinion that Medina's symptoms might be caused by work-related stress. The doctor filled out and gave to Medina a document titled ''Industrial Injury Visit Verification'' that stated the doctor had examined Medina on September 21 and diagnosed Medina as having ''Muscular Back Pain,'' and stated Medina ''has been ill and unable to work from September 21 through September 23.''

The above document that the doctor signed, was given by Medina to his wife to take to Respondent's facility, which she did sometime during the afternoon of September 21.

On September 21, on receipt of the above-described note from Medina's doctor, Lenore Shenker, Respondent's administrator, prepared a ''written reprimand'' for Medina in the form of an ''Employee Disciplinary Notice,'' dated September 21, on which Administrator L. Shenker wrote that Medina was being issued the written reprimand for the following reasons:

> You [Medina] called in on 9/20/92 saying that you have an upset stomach and would not be at work on 9/21/92 . . . On 9/21/92 at 3:15 p.m. your wife delivered a [Doctor's] Excuse from Kaiser for an ''industrial injury''—with the [Diagnosis] of ''Muscular Back Pain.''—You did not follow Hospital procedures. If, in fact, this was a Workmans Comp. Injury, you did not 1) fill out an incident report—2) Go to [Respondent's] Workmans Comp [Doctor].
>
> . . . .
>
> . . . After calling Laura Smith, Assistant Administrator, you told her to ''forget Workmans Comp claim if that was a problem.'' If you say that is not *now* a Workmans Comp Claim, another Doctor's excuse is required with your original reason for calling in.

Although the doctor had authorized Medina to be absent from work through September 23, he returned to work on September 22 and at the end of his work shift that day was notified by Charge Nurse Patricia Rosen that Nursing Director Van Baren was looking for him.[61] Rosen escorted him to the office of Assistant Administrator Laura Smith, who is in charge of administering the Respondent's workers' compensation claim policy. In Smith's office, in the presence of Rosen and Smith, Van Baren showed Medina the above-described employee disciplinary notice, previously prepared and signed by Administrator L. Shenker. Van Baren, Rosen, and Smith accused Medina of having perpetrated a fraud by informing Respondent he was going to be absent from work due to an upset stomach, when the doctor's certificate stated he had incurred an industrial injury. Medina responded by stating it was the doctor who had diagnosed his symptoms as being work related and that Medina could not ''dictate to the doctor what to place in that certificate.''

The above description of what occurred on September 22 in Smith's office between Medina and Respondent's representatives Van Baren, Rosen and Smith, is based on Medina's testimony, which was not denied by either Van Baren or Rosen, or Smith. Administrator L. Shenker testified, however, it was Administrator L. Shenker who met with Medina on September 22 and notified him of his written reprimand and showed him the above-described employee disciplinary notice. When asked, what, if anything, Medina said when he was told the written reprimand was being issued to him, Shenker evaded answering the question; Shenker testified, ''[H]e really did not say much.'' I reject Administrator L. Shenker's testimony and credit Medina's because Administrator L. Shenker's testimonial demeanor was poor, whereas Medina's was good. Moreover, Respondent's failure to call either Van Baren, or Rosen, or Smith to corroborate Administrator L. Shenker's testimony warrants the inference that their testimony would have been adverse to Respondent.

Media testified he understood on September 21 that when he incurred a work-related injury or illness, that under Respondent's policy he was required to make out an incident report and visit Respondent's doctor for treatment. He credibly testified that on September 21 he did not follow this procedure when he went to Kaiser Permanente with his back, chest and stomach discomfort because he did not realize at the time that he was suffering from a work-related injury or illness and it was not until the doctor at Kaiser indicated this to him that he was alerted to the fact that his symptoms might be work related.

(2) Discussion

As described above, Respondent told Medina the reason for his September 22 written reprimand was that on September 21 he had not complied with Respondent's policy that an employee must be treated by Respondent's physician for a work-related injury or illness. I am of the view that this was not the real reason why Respondent disciplined Medina. This opinion was influenced by the following considerations.

Respondent did not give Medina the opportunity to explain or defend himself before deciding to discipline him. In failing to do so, Respondent deviated from its policy of giving employees an opportunity to explain or defend themselves before it decides whether to discipline them.

Respondent failed to follow its practice of having the head of the nursing department, Van Baren, decide whether an employee in that department should be disciplined. Instead it was Respondent's administrator, L. Shenker who decided to discipline Medina, even though Shenker does not usually concern herself in matters involving employee discipline.

Respondent failed to follow its usual system of progressive discipline when it decided to discipline Medina. Thus, as described supra, under Respondent's system of progressive discipline, an employee is first counseled about the employee's misconduct; the employee is alerted by supervision to the fact that he or she has engaged in an act of misconduct and should not let it happen again. Only if the conduct occurs again is the employee issued a verbal or a written reprimand, or some other form of discipline, memorialized in the form of an employee disciplinary notice. Respondent did not follow this procedure in the case of Medina's September 22 discipline, however, even though there is no evidence or contention that prior to Medina's September 21 visit to Kaiser, that he had violated the Company's policy requiring employees to visit Respondent's physician for medical treatment concerning work-related injuries. Also, in Medina's 11-1/2 months of employment with Respondent, Medina had not received a written reprimand and there is no evidence that he was otherwise the subject of discipline. Under these circumstances, it is clear that Medina, under Respondent's system of progressive discipline, at most, should have been counseled for having gone to Kaiser, rather than disciplined.

The above conclusion that Respondent deviated from its system of progressive discipline by disciplining rather than counseling Medina for going to Kaiser, rather than to Respondent's own doctor, is further supported by the fact that Respondent's posted notice that explains its workers' compensation claim policy, covers a situation when an employee

[61] Rosen at this time was a charge nurse. In October she took Meagher's place as Respondent's assistant director of nurses.

realizes that the employee's injury is work related. It does not expressly cover Medina's situation, where an employee goes to his own physician for medical treatment not realizing his injury or illness was work related, until the doctor, after examining the employee, indicates the illness or injury may be related to the employees' work environment. In such a situation Respondent normally gives the employee a chance to rectify the situation (Tr. 1498, 1635). Here, however, Respondent ignored Medina's explanation that it was the Kaiser doctor, not Medina, who diagnosed Medina's pain and discomfort as being work related. Indeed, according to the employee disciplinary notice prepared by Administrator, L. Shenker, in connection with Shenker's decision to discipline Medina, not only did Medina explain to Respondent that it was the doctor who had diagnosed his illness as work related, but Medina had also assured Respondent's assistant administrator, Smith, that it was not his intention to file a worker's compensation claim against Respondent concerning this illness. Nevertheless, despite the reasonableness of Medina's explanation, despite his assurance that he did not intend to file a worker's compensation claim, despite his past unblemished disciplinary record, and despite the fact that in the past he had not violated Respondent's workers' compensation claim policy, Respondent's administrator, L. Shenker, who normally does not concern herself with the discipline of employees, summarily decided to discipline Medina, without even affording him an opportunity to explain or defend his conduct. Clearly, these circumstances establish that in disciplining Medina, instead of merely counseling him, Respondent deviated from its usual system of progressive discipline and that the real reason for Medina's discipline was not that he had gone to Kaiser on September 21 for medical treatment, instead of to Respondent's physician, but was merely used by Respondent as an excuse to discipline him for some other undisclosed reason. I further find, for the reasons below, that the record as a whole warrants the conclusion that it was Medina's union activity that was a motivating factor for Medina's September 22 written reprimand.

As I have found supra, during the 2-month period immediately before Medina's September 22 discipline, there were four union organizational meetings held at his home attended by Respondent's employees.

As I have found supra, in an effort to discover the identities of the union activists and sympathizers in its employ, Respondent asked Supervisor Bagley to report to management the names of such employees and asked employees Mejia, and Ignacio to spy on employees' union activities on behalf of Respondent. I considered that Bagley refused to engage in this conduct, and was no longer in Respondent's employ during the greater part of the time material to Medina's discipline, and that Mejia, and Ignacio were employed on the night shift. Given Respondent's effort, however, to enlist the aid of Bagley, Mejia, and Ignacio to identify the union activists and sympathizers in its employ, it would be naive for me to believe that Respondent stopped with these individuals and did not solicit others in its employ to identify for Respondent's management the union activists and sympathizers in its employ.

Respondent's extreme hostility towards employees who were union activists or sympathizers is evident from the unfair labor practices that I have found Respondent has committed in order to penalize or punish employees for having supported the Union and/or to discourage them from supporting the Union.

Medina, who, in his previous 11-1/2 months of employment with Respondent had not been disciplined, was disciplined for the first time only 3 days before the September 25 union representation election.

The aforesaid factors—Medina's union activity, Respondent's efforts to identify those employees who were union activists or sympathizers, Respondent's antiunion animus, and the timing of Medina's discipline—when considered in the context of Respondent's pretextual reason for disciplining Medina, is sufficient to create the inference that Respondent was aware of Medina's union activity and discharged him for that reason. I, therefore, conclude that the General Counsel has established that Respondent's animus toward Medina because of his union activity was a motivating factor for Respondent's decision to issue him a written reprimand on September 22.

Respondent does not assert any business reason, other than the one that I have found was pretextual, for disciplining Medina on September 22 even if he had not engaged in his union activity. I, therefore, find that Respondent's discipline of Medina on September 22 violated Section 8(a)(1) and (3) of the Act.

b. *Medina's October 26 discipline*

(1) The evidence

During the week of October 19, Day-Shift CNA Hansa Kamdar informed Respondent's management she observed CNA Florencio Baldoza abusing a patient. Respondent's investigation of this allegation resulted in Baldoza's discharge.

On the morning of October 26, or a day or two before, Medina, during the morning break period, was seated at a table in the breakroom with his wife Emma and with CNAs Juris Calabaio and Agnes Weiss. They were discussing Baldoza's discharge. They all expressed surprise over his discharge and asked one another why he had been discharged. Kamdar, who was seated at another table in the breakroom, got up and came over to the table where Medina and the others were seated and asked why they always spoke about Baldoza's termination when she was around. Medina answered that this was the first time they had discussed Baldoza's termination, and explained they had discussed the subject because they were surprised to hear he had been terminated. Kamdar stated she did not know why he was terminated and was not responsible for his termination, and began to cry.

The above description of Kamdar's encounter with Medina is based on the undenied testimony of Medina, whose testimonial demeanor was good when he gave this testimony. Medina also credibly testified this was the only occasion when he spoke about Baldoza's termination in Kamdar's presence, and credibly denied accusing Kamdar of being responsible for Baldoza's termination or asking Kamdar why she had reported Baldoza, or that when he spoke to Kamdar he used words to the effect that Baldoza had done nothing wrong by using a pillow.

On October 26, between late morning and 3 p.m., the end of Medina's work shift, Medina was called to the office of Assistant Administrator Smith, where, in the presence of

Smith and Assistant Nursing Director Rosen, Nursing Director Van Baren showed Media an employee disciplinary notice dated October 26 that had been signed by Van Baren and Smith and that stated Medina had been issued a ''written reprimand'' for the following reasons:

> On the days of Oct 24th and 25th it was reported to administration that you harassed a fellow employee regarding Florencio Baldoza. This is against hospital policy—the employee who was harassed told you to stop and you refused. On 9/21/92 you were written-up for failure to follow Hosp. policy. If you have any questions regarding hospital policy refer to your handbook or contact your supervisor.

Van Baren told Medina it was Kamdar who had complained about the alleged harassment. Van Baren warned Medina his conduct would not be tolerated. Medina responded by stating he had not harassed Kamdar, and explained to Van Baren that what occurred was during a break period he had been speaking to other employees about the reason for Baldoza's discharge, when Kamdar, who had not been a party to the employees' discussion, interjected herself into the discussion by asking why it was that every time Kamdar was present that the employees talked about Baldoza, and started to cry. Van Baren replied this was not what Kamdar had told Van Baren, and Van Baren instructed Medina to leave Kamdar alone and told him she would not tolerate harassment. Van Baren also asked if Medina did not feel it was wrong for a CNA to place a pillow over a patient's face. Medina replied he had never said that this type of conduct was permissible. The meeting ended with Van Baren informing Medina she expected his behavior to stop immediately and also expected him to assist Kamdar in her work, if she needed help, because harassing another employee included refusing to assist that employee.

The above description of the October 26 meeting between Medina, Van Baren, Rosen, and Smith is based on a composite of the testimony of Van Baren and Medina. I have not rejected Van Baren's testimony, despite her poor testimonial demeanor, because her testimony about this meeting did not conflict with Medina's.

Van Baren was Respondent's sole witness with respect to Medina's October 26 written reprimand. She did not expressly testify why she decided to issue this written reprimand. She did testify, however, about the circumstances that caused her to prepare and sign the October 26 employee disciplinary notice that notified Medina he had been issued a written reprimand. Van Baren's testimony is summarized as follows. On the morning of October 26, Kamdar, who was crying, told Van Baren that during the previous 2 days Medina had ''harassed'' her by accusing her of getting Baldoza fired, by asking Kamdar why she had reported Baldoza, and by stating that Kamdar knew that what Baldoza had done was not wrong. Van Baren, on being told this by Kamdar, immediately contacted Respondent's labor relations consultant who directed her to prepare a statement for Kamdar to sign. Van Baren, based on what Kamdar had told her, prepared such a statement, and Kamdar signed it on October 26, in Van Baren's presence. This statement, Respondent's Exhibit 19, reads in pertinent part:

> I was on duty as a CNA on both Sat. Oct. 24th and Sunday Oct. 25th, 1992. On both of these days I was approached by another CNA, Ben Medina. He kept harassing me saying that I got Florencio fired. He kept saying to me that Florencio was a nice man and that he was nice and helped you why did you report him. You know that there was nothing wrong with him putting a pillow case like that. Because of these statements, he has me in tears making it difficult for me to do my job.

Van Baren further testified she met with Medina on October 26, as described supra, a few hours after having prepared the above-typed statement for Kamdar's signature. She further testified that the reason she decided to discipline Medina before even speaking to him about Kamdar's accusation was that if, after discussing Kamdar's accusation with Medina, there was a reason for her to change her decision, ''at that point it could have been changed'' (Tr. 1629–1630). This testimony is unbelievable, however, when viewed in the context of Van Baren's subsequent conduct. For, as described above, it is undisputed that during his October 26 meeting with Van Baren, Medina denied having harassed Kamdar, as alleged in the disciplinary notice, and explained to Van Baren what had in fact occurred and stated that the incident had taken place in the breakroom in the presence of other employees. Yet, Van Baren rejected Medina's explanation without even speaking to the other employees who were present during the alleged harassment, so as to determine whether Medina was telling the truth. In acting in this manner, Van Baren deviated from her usual policy of conducting an investigation prior to deciding whether or not to discipline an employee.

As I have previously stated, Van Baren's demeanor—the tone of her voice and the way she spoke, looked and acted while testifying—has led me to believe she was a dishonest witness, more interested in tailoring her testimony to support Respondent's case than in the truth. This was also my impression of her when she testified about her October 26 conversation with Kamdar and about the preparation of the typed statement signed by Kamdar and about her reason for deciding to discipline Medina even before affording him the opportunity to explain or defend himself against Kamdar's accusations. In other words, because of Van Baren's poor testimonial demeanor I am unwilling to accept her uncorroborated testimony concerning these matters.

(2) Discussion

In deciding to discipline Medina on October 26, Van Baren deviated from Respondent's usual practice in two significant respects; she made the decision without first giving Media an opportunity to explain or defend himself against Kamdar's accusations, and failed to conduct an investigation to determine whether the accusations were true, even after Medina had told her he had not engaged in the misconduct attributed to him and specifically indicated to Van Baren that there were witnesses present who would corroborate his explanation. Van Baren was in such a hurry to discipline Medina, however, that she summarily decided to discipline him. These factors, when considered together with Respondent's violation of the Act when it disciplined Medina on September 22 for his union activity, persuade me that the General

Counsel has established that a motivating factor for Respondent's decision to discipline Medina on October 26 was his union activity.

Having found the General Counsel has established a prima facie case to support the complaint's allegation that Respondent's October 26 discipline of Medina violated the Act, the remaining question is whether Respondent has demonstrated by a preponderance of the evidence that it would have disciplined Medina on October 26 in the absence of his union activity. For the reasons set forth hereinafter, Respondent has not demonstrated this.

As I have noted supra, Van Baren was Respondent's sole witness with respect to Medina's October 26 written reprimand. She did not, however, expressly testify why she decided to issue this written reprimand. The employee disciplinary notice, however, that Van Baren prepared and showed to Medina on October 26 states, in substance, that the reasons Medina was being disciplined were twofold: (1) Respondent had been informed he had been harassing a ''fellow employee,'' referring to Kamdar, which constituted a violation of hospital policy; and (2) this was not the first time Medina had violated hospital policy because on September 22 he had been disciplined for failing to follow hospital policy. Thus, the reason that supposedly triggered Respondent's decision to discipline Medina on October 26 was Kamdar's report to Van Baren that Medina was harassing her, and a contributing cause for the decision was that Medina had been previously disciplined on September 22 for violating company policy.

As I have found supra, Van Baren's uncorroborated testimony concerning what caused her to believe Medina had harassed Kamdar, is not reliable, thus there is no credible evidence to support Respondent's contention it would have disciplined Medina on October 26 for harassing Kamdar even in absence of Medina's union activity. In any event, since Medina's employee disciplinary notice admits that a contributing cause of his October 26 discipline was that on September 22 he had been disciplined for his union activity,[62] this establishes that Medina in all probability would not have been disciplined on October 26 if he had not engaged in union activity. It is for the foregoing reasons that I find Respondent has failed to establish it would have disciplined Medina on October 26 in the absence of his union activity. I, therefore, find that Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by issuing Medina's October 26 written reprimand.

c. *Medina's January 28, 1993 discipline*

(1) The evidence

Medina has worked on the day shift as a CNA since October 7, 1991. The day shift begins at 6:30 a.m. and ends at 3 p.m.

One of the duties of a day-shift CNA is to assist the patients to take showers. Patients are not required to take a shower. If a patient is ''alert,'' able to communicate whether the patient desires to take a shower, the CNA assigned to care for that patient is required to ask the patient every other day if the patient desires to take a shower and the patient has the right to decline the offer of a shower. Prior to the events material to Medina's January 28, 1993 employee disciplinary notice, there was no requirement that patients be showered in the morning. It was permissible for the CNAs to have their patients shower in the afternoon, prior to the end of the shift.

The above description of the obligation of the CNAs employed on the day shift to assist their patients to take showers is based on the undenied testimony of Medina, whose testimonial demeanor was good when he gave this testimony. I considered that Assistant Nursing Director Rosen, as described infra, testified that when she disciplined Medina on January 28 for not having given showers to patients Chance and Harvey that morning, she told Medina the patients were not to be showered in the afternoon unless authorized by the patients' physician and that even if patient Chance had indicated she did not want to take a shower, Medina was supposed to check with the charge nurse about this. Respondent presented no evidence, however, to controvert Medina's credible testimony that during the period he had been employed on the day shift, prior to January 28, 1993, it was permissible for the CNAs to give their patients their showers in the afternoon if they were unable to do so in the morning and that the patients had the right to refuse to take a shower.

On January 28, 1993, Medina was working at station 3. Two of his patients were Harvey and Chance. Medina testified it was his practice to have Harvey take his shower in the afternoon, before Medina returned him to his bed, and on January 28 it was Medina's intention to follow that practice. Medina's testimonial demeanor was good when he gave this testimony. I also note Respondent maintains charts for each patient, which on a daily basis show whether or not the patients have been given a shower and, if so, the time of the day the shower was given. Respondent failed to produce Harvey's charts to refute Medina's undenied testimony that it had been his practice prior to January 28 to take Harvey for a shower in the afternoon rather than the morning.

Chance, as an ''alert'' patient, had the right to decline to take a shower. On the morning of January 28, Medina asked Chance whether she wanted to take a shower. Chance responded by shaking her head in a manner that indicated she did not want a shower that day. Medina testified that although Chance was not able to speak, she was mentally alert and able to communicate to Medina whether or not she wished to take a shower. Rosen testified to the effect that Chance was not sufficiently mentally alert, to indicate whether or not she desired to take a shower. I credited Medina's testimony because his testimonial demeanor, which was good when he testified about this matter, was better than Rosen's.

On January 28, 1993, the charge nurse normally assigned to station 3 on the day shift was apparently unavailable, so the position was filled that day by Acting Charge Nurse Patricia Rosen, who was the assistant director of nurses. Rosen had been the assistant director of nurses since October 1992. Prior to October, Rosen, who is a licensed vocational nurse, had worked for Respondent as a charge nurse whose duty was to rotate among the various shifts. During this period, however, she had worked only ''occasionally'' on the day shift, the shift on which Medina was employed. Since her appointment in October 1992, as Assistant Director of Nurses Rosen had not worked on Medina's shift as a charge nurse, until January 28, 1993.

[62] As I have found supra, Respondent disciplined Medina on September 22 because of his union activity.

On the morning of January 28, when Medina returned from his lunch break at 11 a.m., Rosen told him she had not observed him taking Chance and Harvey for their showers. Medina acknowledged this was true. Rosen said nothing further to Medina. Instead, she left Medina and prepared an employee disciplinary notice that stated on January 28 Medina's work performance had been unsatisfactory because he had not showered Chance and Harvey and had not checked with Rosen about ''any [patient] refusing or problem you may be having.'' Rosen testified she did not issue the aforesaid disciplinary notice in her capacity as Respondent's assistant director of nurses, but acted in her capacity as acting charge nurse (Tr. 2057).

On January 28, 1993 Rosen showed the above described employee disciplinary notice to Medina, who, after reading it, told Rosen since it was only 11 a.m., it was too early for Harvey's shower and explained to Rosen it was his practice to give Harvey a shower in the afternoon before returning him to his bed. Regarding his failure to have showered Chance that morning, Medina explained to Rosen he had asked if Chance wanted to take a shower and Chance had indicated she did not want to take a shower that day.

The above description of what Medina said to Rosen after reading the employee disciplinary notice is consistent with Medina's and Rosen's testimony. Their testimony, however, conflicts sharply about what, if anything, Rosen, said to Medina. Medina testified that Rosen did not reply to the reasons Medina explained to her for not having given showers to Harvey and Chance that morning. Rosen testified that she responded to Medina's explanation by stating: Chance did not have the ability to inform Medina whether she wanted a shower and, even if she had that ability, Medina was supposed to check with the charge nurse before deciding not to give Chance a shower; and, Medina's practice of showering Harvey in the afternoon was improper because all patients were to be showered at the start of the day, absence a doctor's authorization.

On February 12, 1993, Medina sent the following letter to Rosen:

> This has reference to my write-up of January 28, 1993, concerning my failure to shower residents Joseph Harvey and Mary Chance.
>
> On resident Mary Chance, I asked her if she wanted to have shower and she told me she do not want to have shower. Mary Chance is an alert resident. To prove my allegation that this resident is alert, I asked her, in the presence of LVN Grace Marilla, if she wants to have shower and she replied that she do not want to have shower.[63]
>
> On resident Joseph Harvey, I usually bath the resident before putting him back to bed in the afternoon.
>
> When you called me as I was about to go to punch-in my time card after lunch at 11 a.m., and informing me that you wrote me up for not giving showers to my two residents, I was surprised. I signed the write-up not as an admittance for my failure to shower my two residents but an acknowledgment of what you wrote.
>
> After this January 28, 1993, I took note of CNA's assigned in Station 3, who are supposed to be giving showers to at least four (4) residents daily. I noticed that some are not at all giving showers and that nothing have been done against them.
>
> Also, I would like to have copies of my write-ups of Sept. 22, 1992 (going to hospital) and October 24, 1992 (harrassment) [sic] aside from the recent write-up.
>
> I am enclosing herewith a self-stamped envelope for whatever documents you can send me.

On or about February 14, 1993, Medina was called to Administrator L. Shenker's office and asked by her why he had sent the above letter, rather than personally speak to Rosen about the matters contained in the letter. Medina replied in substance he felt more comfortable putting it in writing. Administrator L. Shenker stated she thought it would be better if Medina communicated in person with Rosen. The meeting ended with Shenker refusing, without an explanation, to comply with Medina's request that Respondent provide him with copies of the employee disciplinary notices that had been issued to him in September and October 1992, and January 1993.

On direct examination, Rosen, when asked to describe the circumstances that caused her to discipline Medina, testified that at the start of the work shift on January 28, she instructed all of the CNAs, among other things, to make sure to ''get your patients to activities'' on a ''timely basis.'' Significantly, she did not testify she instructed them to take their patients for their showers the first thing in the morning. Subsequently, however, when I asked why, instead of merely counseling Medina for his failure to shower Chance and Harvey that morning, she had disciplined him, Rosen testified in effect that the reason she disciplined Medina was because he acted insubordinate toward her. In support of this assertion she further testified that at the start of the work shift on January 28 she ''specifically'' instructed all of the CNAs to get their patients ''up,'' ''showered,'' and take them to their ''activity.'' I reject this testimony because of Rosen's poor testimonial demeanor. Moreover, if Rosen's reasons for disciplining Medina, rather than merely counseling him, was his insubordination, why did Rosen not expressly state this in Medina's employee disciplinary notice or when she spoke to him on January 28?

(2) Discussion

Medina was disciplined on January 28 ostensibly for failing that morning to shower patients Chance and Harvey. This was not, in my opinion, the real reason why he was disciplined.

As I have found supra, by failing to shower patients Chance and Harvey on the morning of January 28, Medina did not violate company policy or otherwise act improperly. Respondent has no requirement that patients take a shower in the morning, rather than during the afternoon, and patients have the right to refuse to take a shower. Medina did not take Harvey for his shower on the morning of January 28 because, consistent with Medina's past practice, he intended to shower Harvey that afternoon, and, when Medina on the

[63] This refers to the fact that a few days after January 28, Medina, in the presence of Charge Nurse Grace Marilla, asked Chance whether or not she wanted to take a shower. Medina credible testified he did this in order to corroborate that what he had told Rosen about Chance on January 28 was true; that on January 28 Chance was sufficiently alert so as to have had the ability to indicate to Medina that she did not want to have a shower that day.

morning of January 28 asked if Chance wanted to take a shower that day, she exercised her right not to take a shower. Therefore, the reasons set forth on Medina's January 28 employee disciplinary notice as the basis for his discipline are completely without substance. This warrants the inference that Respondent disciplined Medina for some other undisclosed reason. The pretextual nature of Medina's discipline is demonstrated further by the additional circumstances set forth hereinafter.

As discussed supra, whenever one of Respondent's licensed nurses believes an unlicensed nurse has engaged in conduct that warrants discipline, the licensed nurse, whether it is a charge nurse, or a shift supervisor, or a department head, must submit the disciplinary notice to the head of the nursing department, Van Baren, who, after independently investigating the situation, decides whether to discipline the employee. On January 28, 1993, however, Rosen in her capacity as an acting charge nurse, disciplined Medina without consulting Van Baren. Rosen did not explain why she failed to follow the customary disciplinary procedure in the case of Medina's discipline.

Rosen also summarily decided to discipline Medina, without first asking him why he had not taken Chance and Harvey for their showers. Then, when Medina, after having been informed that he had been disciplined, explained to Rosen why he had not taken Chance and Harvey for their showers, Rosen ignored his explanation even though it constituted a valid reason for his conduct, and if Rosen had investigated she would have discovered that Medina's conduct was justified.

As indicated supra, it was very unusual for Rosen to work as a charge nurse on the day shift. This was the first time in several months that she had acted in this capacity. Yet, Rosen did not consult with the day-shift supervisor or with station 3's regular charge nurse about Medina's conduct. In view of their day-to-day contact with Medina and the patients assigned to him, the day shift supervisor and the station 3 charge nurse presumably would have been able to tell Rosen whether Medina was telling the truth, when he explained to Rosen that Chance was sufficiently alert to indicate she did not want to take a shower, and whether it was Medina's practice, sanctioned by supervision, to shower Harvey in the afternoon, rather than the morning. Instead, Rosen summarily disciplined Medina.

The aforesaid circumstances, together with the lack of substance for the reasons advanced by Respondent in Medina's January 28 employee disciplinary notice, establish that Medina's failure to shower Harvey and Chance was not the real reason for his discipline, but was used as a pretext to discipline him for an undisclosed reason. I further find, for the reasons below, that the whole record warrants the conclusion it was Medina's union activity that was a motivating reason for Medina's January 28, 1993 discipline.

As I have found supra, during the first 11-1/2 months of his employment as a CNA, Medina was not disciplined until September 22 and then again on October 26, and in disciplining him on those dates Respondent did so because of his union activity, in violation of Section 8(a)(1) and (3) of the Act. Thus, Respondent's animosity toward Medina because of his union activity is evident from its discipline of him on September 22 and October 26 because of his union activity. This coupled with the false reasons advanced by Respondent for Medina's January 28, 1993 discipline, establishes that the Respondent's animus toward Medina was a motivating factor for its decision to discipline him on January 28, 1993.

Respondent does not assert any business reasons, other than the ones that I have found were false and pretextual, for disciplining Medina on January 28, 1993, even if he had not engaged in his union activity. I, therefore, find Respondent's discipline of Medina on January 28, 1993, violated Section 8(a)(1) and (3) of the Act.

d. *Medina's March 22, 1993 discipline*

(1) The evidence

Geri-chairs are mobile chairs commonly used at Respondent's facility by the CNAs to transport the patients. It is a violation of Respondent's policies governing employees' conduct, as well as a violation of the regulations promulgated by the California Department of Health, for Respondent's CNAs to transport patients in geri-chairs by pulling the chairs backwards.

In August, when the California Department of Health inspected Respondent's facility, one of the ''deficiencies'' that the inspectors noted in their report was that the CNAs were transporting patients by pulling them backwards in the geri-chairs. Respondent's management dealt with this deficiency by holding meetings with all of the CNAs, where it was made clear to them they were not to pull patients backwards in the geri-chairs, but were to push the chairs forward.

Medina credibly testified that by March 1993 a significant number of the day-shift CNAs, including Medina, once again were pulling geri-chairs when transporting patients, because it was easier to pull the chairs, rather to push them.[64] Medina also credibly testified that they had been observed doing this by several of the charge nurses, but were not disciplined for engaging in this conduct.[65] The sole evidence that they were also observed doing this by the shift's supervisor or by a department head is Medina's undenied testimony that Vera Lacuna, the head of the Respondent's housekeeping and maintenance department, observed him pulling a patient backwards in a geri-chair and said nothing to him.

During the morning of March 22, 1993, Boeger observed Medina transporting a patient by pulling, rather than pushing, the patient's geri-chair. She told Medina to push rather than pull the chair.

Later that same day, early in the afternoon, Boeger called Medina to her office, where she had him read an ''Employee Disciplinary Notice'' prepared and signed by Boeger, which

[64] Medina's testimony is corroborated by Boeger's testimony, infra, that on March 22, 1993, when she spoke to CNA Northrup and the other CNAs specifically named by Medina as having been pulling geri-chairs, they admitted to Boeger that ''everybody'' on the day shift had been doing this.

[65] Although the charge nurses are not supervisors within the meaning of Sec. 2(11) of the Act, the record establishes that under Respondent's system of progressive discipline, the charge nurses are responsible for making sure that the CNAs who work under their supervision obey Respondent's work rules. In carrying out this responsibility, the record also reveals, they submit disciplinary notices to the head of the nursing department, Van Baren, who conducts an independent investigation before deciding whether the employees should be disciplined as recommended by the charge nurses.

stated that on March 22 Medina's performance had been unsatisfactory because ''he was seen pulling a resident backwards down the hallway in a geri chair'' in violation of the resident's right to be treated with respect and dignity and in violation of the rules and regulations governing employee conduct. Medina read the notice, refused to sign it, and told Boeger that the other CNAs on the day shift were pulling, rather than pushing, the geri-chairs and specifically named some of the CNAs he had observed doing this, one of whom was Ginger Northrup. Boeger responded by stating that just because Medina observed others pulling patients in geri-chairs backwards, it did not excuse his conduct because, as Boeger pointed out to Medina, all of the CNAs, including Medina, had been previously informed by Respondent they were not to pull patients backwards in geri-chairs.

Later, on March 22, when he arrived home from work at approximately 3:40 p.m., Medina received a telephone call from Administrator L. Shenker, who told him that starting the next day he was suspended from work for 5 days because of the employee disciplinary notice he had received for pulling the geri-chair and warned him that if he received another disciplinary notice he would be discharged.

Boeger testified in effect she was the person who decided to issue Medina's March 22 employee disciplinary notice for pushing a geri-chair. When questioned about what she did with that notice on March 22, after Medina refused to sign it, Boeger first testified that she was not sure whether she ''gave it to the front office or [to] L. Shenker.'' When pressed further on this subject, however, Boeger testified she gave the employee disciplinary notice to Administrator L. Shenker, told Shenker she had observed Medina pulling the geri-chair and that one of the deficiencies noted by the California Department of Health's inspection in August was that CNAs were pulling geri-chairs. Boeger further testified she told Administrator L. Shenker she did not know ''what kind of action to take'' and Shenker responded by telephoning Medina, in Boeger's presence, and informing Medina he was suspended for 5 days and, still in Boeger's presence, by writing the following notation at the bottom of Medina's March 22 employee disciplinary notice: ''Upon investigation, administration has decided to suspend Ben Medina for 5 working days. Last Warning.''

Boeger was the only witness called by Respondent to testify about its March 22, 1993 decision to issue an employee disciplinary notice to Medina and suspend him for 5 days. Administrator L. Shenker who made the decision to suspend Medina was not questioned about her reason or reasons for imposing this degree of discipline. Nor was Administrator L. Shenker asked to explain why it was her, rather than Nursing Director Van Baren, who decided to suspend Medina. Likewise, Boeger failed to testify why it was Boeger, rather than Van Baren, who decided to issue Medina's March 22 employee disciplinary notice. As I have discussed supra, under Respondent's system of progressive discipline, it is Van Baren who decides whether to discipline the employees employed in her department.

During Boeger's examination by Respondent's counsel, no mention was made of the fact that almost contemporaneously with Medina's March 22, 1993 employee disciplinary notice and 5-day suspension, that Respondent issued only verbal warnings to each of the other CNAs employed on the day shift for engaging in the same conduct as Medina. During cross-examination, however, Boeger was confronted with General Counsel's Exhibits 36 and 37, which indicate on their face that Respondent on March 25 issued verbal warnings to each of the approximately 20 other CNAs employed on the day shift for pulling patients backwards in geri-chairs.

General Counsel's Exhibit 36 is a memo entitled ''Verbal Warning'' dated March 25, 1993, from Boeger to Day-Shift CNA Ginger Northrup, stating Boeger had been told by ''another CNA'' that Northrup had been pulling geri-chairs backwards. The memo warns Northrup that if Boeger ever observed Northrup doing this, Northrup would receive a ''Disciplinary Notice'' and stated Northrup knew it was improper to pull patients backwards because she had been spoken to about the rights of patients.

General Counsel's Exhibit 37 is an ''In Service Training Report'' dated March 25, 1993, signed by each of the 20 CNAs employed on the day shift. It states, in substance, that Boeger and the assistant head of the nursing department Rosen spoke to the day-shift CNAs on March 25 about pushing, rather than pulling, geri-chairs, and all 20 of the day shift CNAs had received a ''verbal warning'' for pushing patients backwards in geri-chairs.

The significant portions of Boeger's testimony elicited during cross-examination concerning General Counsel's Exhibits 36 and 37 was as follows: On March 22, Medina told Boeger that other day shift CNAs were pulling patients backwards in geri-chairs and specifically named some of them; Boeger went and spoke to the CNAs named by Medina, who, when confronted by Boeger, admitted to Boeger that ''everybody'' was pulling patients backwards in geri-chairs (Tr. 1819, L. 5–12); Boeger then issued verbal warnings to the CNAs who made this admission, one of whom was Northrup; and, subsequently, on March 25, Boeger and Rosen met with all of the day-shift's CNAs, approximately 20, at which time they issued to each of them a verbal warning for having pulled patients backwards in geri-chairs.

Boeger testified Medina was penalized more severely than the other day-shift CNAs for engaging in the same misconduct because Boeger personally observed him pulling a geri-chair, whereas Boeger only received hearsay information that the other CNAs had been engaging in this conduct. I do not believe this testimony for these reasons: Boeger's testimonial demeanor, which generally was poor, was no different when she testified about Medina's March 22, 1993 employee disciplinary notice and suspension; and, when Boeger confronted Northrup and the other CNAs specifically named by Medina as having been pulling patients in geri-chairs, Boeger testified that Northrup and the others did not deny having engaged in this conduct, but admitted to Boeger that ''everybody'' was pulling the patients in geri-chairs, thus, as to Northrup and the others who made this admission, Boeger had more than hearsay information concerning their misconduct.

In any event, Boeger's above-testimony is not entitled to any weight insofar as it pertains to Respondent's reason for suspending Medina for 5 days, rather than imposing a lesser penalty for his misconduct, because Boeger was not competent to testify about that matter. According to Boeger's testimony, it was Administrator L. Shenker, not Boeger, who decided to suspend Medina, and, according to Boeger's testimony, Administrator L. Shenker did not explain or otherwise

indicate to Boeger what prompted her to treat Medina differently than the other CNAs who had engaged in misconduct identical to Medina's.[66] Administrator L. Shenker, a witness for Respondent, was not questioned about Medina's suspension.

(2) Discussion

The factors set forth hereinafter have persuaded me that the General Counsel has established that Respondent's animus toward Medina because of his union activity was a motivating factor for Medina's March 22, 1993 employee disciplinary notice and suspension.

Prior to September 22, during the 11-1/2 months of his employment, Medina had not received a written reprimand and there is no evidence or contention he had been otherwise disciplined or counseled. Medina was first disciplined on September 22, and then again on October 26, and again on January 28, 1993. As I have found supra, Respondent disciplined him on those dates because of his union activity, thereby violating Section 8(a)(1) and (3) of the Act. Thus, Respondent's animosity toward Medina because of his union activity is evident from its past history of disciplining him because of his union activity in violation of the Act.

During March 1993, before March 22, the day-shift CNAs, including Medina, when transporting patients around the facility in geri-chairs frequently pulled the patients backwards, instead of pushing the chairs as required by Respondent's work rules. As described in detail supra, when Respondent's management learned that its day-shift CNAs were transporting patients by pulling them backwards in their geri-chairs, it issued verbal warnings to all of the CNAs employed on the day shift, except for Medina, who was issued an employee disciplinary notice and suspended for 5 days for engaging in this conduct. As I have found supra, Respondent offered no credible reason for treating Medina different than the other offenders.

In placing an employee disciplinary notice in Medina's personnel file on March 22 and suspending him for 5 days for having pulled a geri-chair, Respondent deviated from its usual disciplinary procedure. As I have discussed supra, under Respondent's system of progressive discipline, Respondent's director of nurses, Van Baren, decides whether employees in her department will be disciplined and the extent of the discipline. Here, for reasons not explained, the decision to issue Medina's March 22 employee disciplinary notice was summarily made by Boeger and the decision to suspend him for 5 days, rather than to impose some lesser form of discipline, was summarily made by Administrator L. Shenker.

Also as discussed supra, under Respondent's system of progressive discipline, the normal procedure is to merely counsel employees who engage in misconduct, if it is a first offense. Only if they have been previously counseled about engaging in such misconduct are employees issued a verbal or a written warning in the form of a disciplinary notice and it is only after this that employees are suspended or terminated for continuing to engage in the proscribed conduct. Here, the day-shift CNAs, including Medina, had been counseled by Respondent that they should not pull patients backwards while transporting them in geri-chairs, so, when, on March 22, Respondent learned that they were engaging in this conduct despite the prior counseling, Respondent, consistent with its system of progressive discipline, issued verbal warnings to all of the day-shift CNAs, except Medina, for engaging in this conduct. Medina was issued an employee disciplinary notice and suspended for 5 days. Thus, by disciplining Medina significantly more severely than any of the other CNAs, not only did Respondent treat him differently, but in doing so deviated from its usual system of progressive discipline.

The aforesaid factors—Respondent's animosity toward Medina because of his union activity, Respondent's history of disciplining Medina because of his union activity, Respondent's disparate treatment of Medina, and Respondent's deviation from the usual way in which it disciplines employees—establish that Respondent's animus toward Medina for his union activity was a motivating factor for Respondent's decisions on March 22, 1993, to discipline Medina by issuing him an employee disciplinary notice and suspending him for 5 days.

I further find that Respondent has failed to demonstrate it would have issued an employee disciplinary notice to Medina on March 22 and suspended him for 5 days even absent his union activity. Quite the opposite, the disparate way in which Respondent treated Medina by placing an employee disciplinary notice in his personnel file and suspending him for 5 days, whereas all of the other CNAs were merely given verbal warnings for having engaged in the identical misconduct, establishes Respondent would not have issued Medina an employee disciplinary notice and suspended him for 5 days absent his union activity. I, therefore, find that when Respondent disciplined Medina on March 22, 1993, by placing an employee disciplinary notice in his personnel file and suspending him for 5 days, it violated Section 8(a)(1) and (3) of the Act.

8. Caridad Guzman's February 19, 1993 suspension and September 20, 1993 discharge

a. *The evidence*

On September 20, 1993, when she was discharged, Guzman had been employed by Respondent since early 1989. During the time material she was employed as a CNA on the p.m. shift.

As discussed supra, the Union's initial organizational meetings for the p.m. shift were held in May at Guzman's home. Thereafter, during the months of May, June, and July, Guzman attended other union meetings and frequently spoke with employees about the Union.

Also, starting in August, as discussed supra, Guzman wore a white smock to work, which had printed in black above its breast pocket the words, ''One Powerful Force for Health Care Workers,'' and on the breast pocket, the words ''Local 250 SEIU'' printed in black and gold, with the word ''Yes'' and a check mark within a box. Guzman wore this union emblem to work once a week from August 1992 to August

[66] As I have found supra, on March 22, 1993, CNA Northrup and the one or two other day-shift CNAs, who Medina specifically named as having pulled geri-chairs, admitted to Boeger that Medina's accusation was true. It is reasonable to infer that Boeger promptly communicated this information to Administrator L. Shenker. Neither Boeger nor Administrator L. Shenker denied that Boeger did this.

1993, when, as I have found supra, Respondent legally prohibited her from continuing to wear it while at work.

As shown by the several documents that were in her personnel file on September 20, 1993, on February 12, 1993, Guzman's past record of discipline was as follows: On April 27, 1989, she received a written reprimand for speaking a foreign language in front of a patient; on November 28, 1990, she received a written reprimand for recording that she had given a patient a certain medical test or treatment, when she had not; on January 10, 1991, she was counseled for having spoken a foreign language while on duty; on January 17, 1991, she received a written reprimand for inappropriate patient care and for acting insubordinate and antagonistic to the supervisor who reprimanded her; on or about January 17, 1991, she was counseled and received a written reprimand for improper care of a patient and was warned if she received another disciplinary notice she would be terminated; on September 22, she received a written reprimand for excessive tardiness; and, on October 7, received a written reprimand for being tardy for work on 3 out of the 8 days she worked during the last payperiod and warned if the situation did not improve she would be terminated.

On February 12, 1993, towards the end of the p.m. shift, Shift Supervisor Judy Hughes met with CNAs Guzman, Ignacio, and Simon and their Charge Nurse Pat Goel. Hughes handed employee disciplinary notices to the CNAs that were signed by Hughes. The employee disciplinary notice she handed to Guzman (R. Exh. 45), stated Guzman's performance on February 12 had been unsatisfactory because the clerk had paged Guzman twice to transport patient Evanson to her dialysis treatment, Charge Nurse Goel had asked Guzman to help transport Evanson, Guzman had failed to ''respond adequately to help,'' and an off-duty nurse had to help. The employee disciplinary notice stated that in the future Guzman must act as part of the team and help as needed in ''a timely way.'' The notice also advised Guzman she had been issued the notice to give her an opportunity to correct the situation and warned that a repetition of the described conduct or continued unsatisfactory performance would result in further disciplinary action up to and including dismissal. In the section of the notice that described the ''disciplinary action'' that Supervisor Hughes was recommending that Respondent impose on Guzman for her February 12 misconduct, the notice stated that Guzman had spoken to Charge Nurse Goel about the matter. The notice, signed by Hughes, did not recommend that Guzman be issued either a written or a verbal reprimand or be disciplined by other means for engaging in the described conduct, other than being issued the disciplinary notice.

On February 12 when Hughes handed CNAs Guzman, Ignacio and Simon their employee disciplinary notices, she told them she was issuing them the notices because they had not done what Charge Nurse Goel had asked them to do and that Goel was upset about this. Guzman, Ignacio, and Simon apologized to Goel; they stated they were sorry for what had occurred. Goel responded by stating that if they followed her instructions in the future she would personally inform Administrator L. Shenker and President M. Shenker that they were good workers.

The February 12 meeting ended with Hughes asking the CNAs to sign their employee disciplinary notices. They refused and told Hughes they had already apologized to Goel for what had occurred. Hughes told them they did not have to sign the notices and asked them to write their comments on the back of their notices. Guzman, on the back of her disciplinary notice (R. Exh. 45), wrote, in pertinent part, that while herself, Ignacio, and Simon had been told they had been paged twice, they had not heard the page, and when Supervisor Hughes had spoken to them about the incident, they had explained their side of the story and apologized for what had occurred because of the ''miscommunication.''

Guzman was the only witness who testified about Hughes' and Goel's February 12 meeting with Guzman, Ignacio, and Simon, and the issuance of the employee disciplinary notices to them. The above description of what occurred during this meeting is based on the testimony of Guzman whose testimonial demeanor was good.

Regarding the events of February 12, 1993, which led to the issuance of the employee disciplinary notices to Guzman, Simon, and Ignacio, neither Guzman nor any of the other participants testified about those events. The only testimony elicited about those events was Guzman's testimony that ''the incident that caused [Guzman] to have a writeup [referring to the February 12 employee disciplinary notice]'' was that ''I immediately did not follow the request of the charge nurse'' (Tr. 857, LL. 22–25).

It is undisputed that on the morning of February 19, 1993, Nursing Director Van Baren telephoned Guzman at home and told her she had been suspended from work and instructed her to come to the facility immediately.

Guzman testified that when she arrived at the facility that morning she was taken to the office of Assistant Administrator Smith, where, in the presence of Respondent's director of staff development, Boeger, and Assistant Administrator Rosen, she was informed by Van Baren she was suspended for 5 days ''because of the writeup of Bozena Korowski and Judy Hughes.'' Guzman further testified that only other thing that was said to her during this meeting was that she was told she had ''a lousy attitude.''

Regarding Van Baren's reference to the writeup from Bozena Korowski, the sole testimony about this ''writeup'' is Van Baren's testimony that on September 20, 1993, when Van Baren reviewed Guzman's personnel file in connection with Van Baren's decision on that date to discharge Guzman, one of the documents in the file, which Van Baren considered, was Respondent's Exhibit 45, a one-page unsigned document entitled ''Incident Report.'' On its face this document is a form used by Respondent's employees to report ''accidents'' that involve patients. The document states that an ''accident'' occurred at station 1 during the p.m. shift on February 12, 1993, and in the section that asks for a description of the ''accident'' and the names of the witnesses to the ''accident,'' states that on February 12, 1993, while on her way home, Bozena Korowski observed Charge Nurse Goel trying to get some help in transporting patient Evanson, who weighed 202 pounds, to her dialysis treatment, that none of the CNAs including Guzman offered to help, that Korowski personally asked Guzman to help Goel, and that finally Korowski, herself, assisted the patient. No testimony was presented as to how and when this report came into Respondent's possession or who prepared the report. I note that Van Baren, who failed to testify why Respondent decided to suspend Guzman, did not testify what, if any, part of the decision was attributable to the above-described report.

During the portion of this case involving the February 19, 1993 suspension of Guzman, neither Van Baren, Boeger or Rosen were called to rebut Guzman's above description about the events of February 19. Nor did Respondent present evidence that on February 19 it gave or showed Guzman any document pertaining to the Respondent's reasons for suspending her. When the hearing reopened several months later for the sole purpose of litigating Guzman's September 20, 1993 discharge, however, Van Baren testified that in deciding to discharge Guzman on September 20, 1993, she relied on the information contained in several documents that were in Guzman's personnel file, one of which she testified was a ''Disciplinary Notice'' dated February 19, 1993, signed by Van Baren that stated (R. Exh. 45):

> On further investigation of the incident occurring 2/12/93—We have decided to issue a suspension for 5 days in order to impress upon you the importance of following your duties as a CNA you must act as a team. After reviewing your file this is part of a pattern of your behavior and is to cease immediately. Any further in fraction of any rules will result in termination. This is your last write-up.

Van Baren further testified that, as stated in the above notice, she in fact told Guzman on February 19, when she met with her, that any further infraction of the Company's rules would result in her termination. She testified she told Guzman this on February 19 in the office of Respondent's patient coordinator in the presence of only Connie Mathis, Respondent's office manager. When asked to testify about the conversation that occurred between herself and Guzman at that time, Van Baren testified she discussed with Guzman that there were three licensed nurses sufficiently angry with her so as to have written her up, asked Guzman what has occurred on February 12, Guzman told her what had occurred, and Van Baren responded by showing Guzman all of the ''other writeups'' in her personnel file that dated back to 1989, and told Guzman that the above disciplinary notice was going to be the last one.

I credit Guzman's above testimony of what occurred on February 19 and reject Van Baren's because Guzman's testimonial demeanor was good, Van Baren's testimonial demeanor was poor, Respondent failed to call Mathis to corroborate Van Baren's testimony, and Respondent failed to call either Rosen or Boeger to contradict Guzman's testimony.

On June 22, 1993, Guzman was suspended from work for 3 days. The employee disciplinary notice that informed her of the suspension stated she had been suspended for violating Respondent's ''attendance policy'' because the reason given by Guzman for her absence from work on June 19 was unacceptable. The notice concluded by notifying Guzman that any further violation of the Respondent's ''attendance and tardiness'' policy would result in her termination. The General Counsel does not contend, nor does the complaint allege, that Guzman's June 22, 1993 suspension was unlawful.

On September 17, 1993, Guzman was assigned to station 3 on the p.m. shift, with three other CNAs and an LVN charge nurse. The four CNAs and LVN charge nurse on September 17 failed to get station 3's patients out of their beds and dressed for dinner. This was a violation of the Respondent's standard procedures in effect at that time. This infraction of Respondent's policy triggered Guzman's September 20, 1993 discharge. The other three CNAs and the LVN charge nurse received written reprimands for not dressing the patients and getting them out of bed for dinner. None of the other CNAs or the LVN charge nurse had been previously disciplined.

On September 20, 1993, Guzman was notified of her discharge by Nursing Director Van Baren's memo. In the memo Van Baren notified Guzman that Van Baren's investigation had revealed, among other things, that in violation of the Respondent's policy, Guzman on September 17 had failed to dress her patients and get them out of bed for dinner and had no legitimate reason for failing to do this. The memo then concluded with Van Baren explaining her decision to discharge Guzman, in these words:

> Upon review of [Guzman's] personnel file, she has two prior suspensions. One involving resident care. She was warned at this time that no further incidents would be tolerated. Based on this the decision has been made to terminate employment.

Van Baren testified that ''part of the reason'' why she decided to discharge Guzman was that Guzman ''already had two suspensions'' (Tr. 2139), and, when asked if she would have made the same decision if Guzman had only one suspension, Van Baren testified, ''it's really hard to answer something in hindsight. I probably would have. I possibly might not have.'' (Tr. 2143–2144.)

b. *Discussion*

(1) Guzman's February 19, 1993 suspension

The factors set forth hereinafter persuade me that the General Counsel established that Respondent's animus toward Guzman because of her union sympathy and activity was a motivating factor for Respondent's decision to suspend her from work on February 19, 1993.

Respondent knew Guzman was a leading union adherent. In August, prior to the scheduled September 25, 1992 representation election, Guzman wore to work a union emblem on her uniform that asked the employees to vote yes for union representation and, in February 1993, was still wearing that emblem to work once a week. Clearly, Respondent was well aware of Guzman's prounion sympathies and that she was actively soliciting other employees to support the Union in its campaign to organize the Respondent's employees.

Respondent's animosity towards employees who supported the Union is evident from the numerous unfair labor practices I have found Respondent committed in 1992 and 1993 in an effort to discourage its employees from supporting the Union.

Guzman was treated differently than CNAs Ignacio and Simon. As described supra, on February 12 Respondent issued employee disciplinary notices to CNAs Guzman, Ignacio, and Simon for having that day failed to follow Charge Nurse Goel's request that they assist in transporting a patient. Subsequently, 7 days later, Respondent suspended Guzman for having engaged in this conduct. There is no evidence that either Ignacio or Simon were disciplined in any manner, other than being issued employee disciplinary no-

tices. Respondent's failure to produce such evidence, which is particularly within its knowledge, warrants the inference that Ignacio and Simon received no further discipline for having failed to do what Goel had requested of them. Respondent failed to explain why Guzman was suspended for 5 days for the part she played in the events of February 12, while Ignacio and Simon were issued only employee disciplinary notices.

The aforesaid factors—Respondent's knowledge of Guzman's prounion sympathy and activity, Respondent's antiunion animus, and its disparate treatment of Guzman—when considered with Respondent's failure to explain its belated decision to discipline Guzman by suspending her for conduct she had committed 7 days earlier, for which Guzman's immediate supervisor had disciplined her by merely issuing her an employee disciplinary notice, establishes that Respondent's animus toward Guzman for her union sympathy and activity was a motivating factor for Respondent's decision on February 19, 1993, to discipline Guzman by suspending her for 5 days.

I further find that Respondent did not demonstrate it would have suspended Guzman on February 19 even if she had not engaged in union activity. Respondent failed to demonstrate this because it failed to call Van Baren or any of Respondent's representatives involved in the decision to suspend Guzman to testify about Respondent's motive for treating Guzman differently than CNAs Ignacio, and Simon by belatedly deciding to suspend Guzman 7 days after having issued Guzman, Ignacio, and Simon only disciplinary notices for their February 12 misconduct. Having failed to present evidence of its motivation for suspending Guzman, Respondent failed to rebut the General Counsel's prima facie case. I, therefore, find that when Respondent suspended Guzman for 5 days on February 19, 1993, it violated Section 8(a)(1) and (3) of the Act.

I considered Respondent's contention, advanced in its post-hearing brief, that its decision to suspend Guzman on February 19 was based on her past disciplinary record. Respondent elicited no testimony, however, that this was what motivated Guzman's suspension. In fact, when the record closed on the portion of this case dealing with Guzman's February 19 suspension, the sole evidence of Guzman's past disciplinary record was her testimony that the disciplinary notice she received on February 12 was not the first one she had received, that she had received other disciplinary notices. But no evidence whatsoever was presented about the extent of Guzman's past history of discipline or the reasons for such discipline. Nor did Respondent elicit evidence that its decision to suspend Guzman was based on her past record of discipline. When the hearing reopened, however, several months later for the sole purpose of litigating Guzman's September 20, 1993 discharge, Van Baren testified that on September 20, 1993, in deciding whether to discharge Guzman, she reviewed Guzman's personnel file, and the file on that date contained the several employee disciplinary notices, described earlier in this decision, which she testified she reviewed in deciding whether to discharge Guzman. These documents were received in the record solely for the purpose of allowing Respondent to show what, if any, influence they had on Van Baren's decision to discharge Guzman. In any event, Van Baren did not testify that these documents influenced Respondent's decision, made several months earlier, to suspend Guzman.

(2) Guzman's September 20, 1993 discharge

It is undisputed that Respondent's decision to discharge Guzman on September 20, 1993, was based in part on the fact that Respondent had previously suspended Guzman for 5 days on February 19, 1993.[67] As described in detail supra, on September 20 Van Baren notified Guzman, in writing, that Respondent had decided to discharge her because she had already been disciplined twice; on February 19, 1993, and June 22, 1993. Also, as described in detail supra, Van Baren testified that Respondent's decision to discharge Guzman was based, in part, on the fact that Guzman had already been disciplined twice with suspensions; on February 19 and June 22, 1993.

Having found that Respondent suspended Guzman on February 19, 1993, because of her union activity, in violation of Section 8(a)(3) and (1) of the Act, and, having also found, that Guzman's September 20, 1993 discharge was based, in part, on her February 19, 1993 suspension, it follows that Respondent violated Section 8(a)(3) and (1) of the Act, when it discharged Guzman on September 20, 1993.

9. On October 7, 1992, Respondent issues counseling reports and employee disciplinary notices to 30 employees who had been late for work

a. *The evidence*[68]

On April 1, 1992, Boeger assumed the position of Respondent's director of staff development. She had been employed by Respondent in a licensed nurse capacity continuously since 1988, first as an LVN and then as its patient care coordinator.

Before and after Boeger's employment as director of staff development, and at all times material, employee tardiness was defined by Respondent as when an employee punched in for work more than 7 minutes late. Thus, whenever I use the terms late or tardy hereinafter, they refer to an employee who was more than 7 minutes late for work.

On April 1, when Boeger assumed the position of director of staff development, a substantial number of employees frequently came to work late. This situation existed even prior to April 1 and continued through September (Tr. 1802, LL. 5–9; 1890, LL. 1–18).

Boeger, prior to April 1, knew that many of the employees were frequently late for work (Tr. 1890, LL. 13–15), and when she assumed the position of director of staff development on April 1, this situation continued, and it was not until October 7, shortly after a majority of the employees voted in favor of union representation, that Boeger acted to put a stop to the employees' tardiness (Tr. 1890–1891).[69] Prior to October 7, the only thing Boeger had done to remedy this

[67] The record fails to establish that even absent Guzman's February 19, 1993 suspension, Respondent would still have discharged her on September 20, 1993.

[68] Unless otherwise stated, all of the evidence is based on the testimony of Julia Boeger, Respondent's director of staff development.

[69] On September 25, as discussed supra, a majority of Respondent's employees, in a Board-conducted representation election, cast their ballots in favor of union representation.

situation was to speak to individual employees about their tardiness. On October 7, Boeger instituted a new policy governing the number of days an employee could be late for work during a payperiod.

Immediately before October 7, Boeger reviewed all of the employees' timecards for the last payperiod in September and made the following decision: Those employees whose timecards showed they had been late for work on more than 3 occasions during that payperiod would receive a counseling report for their tardiness, if they had not been counseled or disciplined previously for tardiness; and, those who had a prior history of being counseled or disciplined for tardiness would receive a disciplinary notice.

There is no evidence or contention that prior to this time Respondent had a policy whereby employees who were tardy more than three times during a payperiod were subject to discipline. To the contrary, the tenor of Boeger's testimony warrants the inference that before October 7 no such policy existed. Boeger testified that for a period of more than 6 months prior to October 7, a large number of the employees were frequently late for work and it was to remedy this situation that prompted her in early October to issue counseling reports and disciplinary notices to 30 employees for being late on more than 3 days during the payperiod ending September 30. If this policy existed previously, I am convinced that Boeger would have implemented it long before October 7.

I considered Boeger's testimony that when she orients new employees about Respondent's policies, one of the policies included in the document that all the new employees must sign, concerns ''a thing about tardy and absenteeism'' and refers to ''three absenteeism, three tardies.'' According to Boeger, this was where she got the idea for limiting employees to three tardy workdays during a payperiod. Boeger, however, testified she was unable to remember what this orientation paper said on the subject of tardiness. Boeger's testimony that she was unable to remember what the orientation paper signed by new employees says on the subject of tardiness was not given in a convincing manner and does not ring true because the record reveals that conducting orientation sessions for the new employees is a major part of Boeger's job and as part of that job she also explains Respondent's policies to the employees. Under the circumstances her testimony that she had no memory of what the orientation paper said about tardiness is incredible. I also note Respondent did not produce a document indicating that prior to October 7 Respondent's employees were subject to discipline if they were tardy more than three times during a payroll period. Respondent's failure to produce such a document is not surprising because Boeger testified that the policy that she implemented on October 7 concerning the employees' tardiness had not been reduced into writing by Respondent (Tr. 1802, LL. 10–17).

Boeger instituted this new policy on October 7 at a meeting of the employees employed on the day and p.m. shifts. Boeger spoke to them about their tardiness[70] and issued counseling reports and employee disciplinary notices to 30 of the employees; counseling reports to those with no prior history of being counseled or disciplined for tardiness, and disciplinary notices to those with such a history. In deciding to issue the 30 counseling reports and employee disciplinary notices, Boeger reviewed the timecards for the last payperiod, the one ending September 30, of all the employees employed on the day and p.m. shifts, with the object of disciplining those whose timecards showed that during that payperiod they were late for work on more than three occasions.

[70] The record is silent about what Boeger said to the employees.

b. *Discussion*

The complaint alleges that on October 7 Respondent violated Section 8(a)(3) and (1) of the Act because: (1) ''Respondent effectuated a change in its employee tardiness policy regarding school class attendance''; and (2) ''[Respondent] issued written counseling notices to 30 employees.'' For the reasons below, I find that the second part of this allegation has merit, whereas the first part is without merit.

(1)

Boeger's undenied testimony, which was not controverted by other record evidence, establishes Respondent did not have a policy or a practice of allowing employees who were attending school to be late for work, when their starting time conflicted with their school schedule. It is for this reason that I shall recommend the dismissal of the allegation that Respondent violated the Act on October 7 by changing its employees tardiness policy regarding school class attendance.

(2)

On October 7 Respondent issued counseling reports and employee disciplinary notices to 30 employees for being late for work. It is my opinion that the wholesale issuance of the counseling reports and employee disciplinary notices on that day was motivated by Respondent's animus toward the Union and by a desire to punish employees because a majority of them had voted in favor of union representation.

On October 7 the counseling reports and employee disciplinary notices were issued by Respondent to 30 employees hard on the heels of the Union's victory in the September 25 representation election. In an effort to discourage the employees from supporting the Union, as I have found elsewhere in this decision, Respondent engaged in numerous unfair labor practices before and after its October 7 conduct at issue herein. Further, for several months prior to October 7, even before the start of the Union's organizational campaign, Respondent knew that many of its employees were frequently late for work, yet it was only after a majority of the employees voted in favor of union representation that Respondent for the first time took meaningful disciplinary action to remedy this problem, by instituting a new and more stringent disciplinary policy to govern employees' tardiness, which resulted in 30 employees being issued counseling reports and employee disciplinary notices on October 7. The foregoing factors, taken together, establish a prima facie case that the counseling reports and employee disciplinary notices issued to 30 employees on October 7 for being tardy were issued for discriminatory purposes. I further find, for the reasons below, that Respondent has failed to rebut the General Counsel's prima facie case.

As I have found supra, Boeger testified that for several months prior to October 7, even before the start of the Union's organizational campaign, Respondent knew that too

many of its employees were frequently late for work, yet it was only shortly after a majority of the employees voted in favor of union representation, that on October 7, for the first time, Respondent took meaningful disciplinary action to remedy the problem, when Boeger issued counseling reports and employee disciplinary notices to 30 employees because, based on Boeger's review of the employees' timecards, they had been late for work more than three times during the last payperiod. In deciding whether Respondent has rebutted the General Counsel's prima facie showing that the October 7 counseling reports and employee disciplinary notices were motivated by Respondent's union animus, the Respondent must demonstrate that they would have been issued on October 7 even absent the Union's organizational campaign.

Boeger testified the reason she waited several months, until October 7, to do something about the employees' tardiness was she was ''so busy getting used to [her] job'' that perhaps she did not realize the seriousness of the problem until October, or, if she was aware of its seriousness earlier, she did not have sufficient time to deal with the problem until October 7 (Tr. 1889–1891). I reject this uncorroborated testimony in its entirety because when Boeger gave it her demeanor—the way she spoke, the tone of her voice and the way she looked and acted while testifying—was poor. Also, it would be naive for me to believe that if Respondent had serious problems concerning such a significant matter as employees' tardiness, that Respondent's administrator and her several department heads would have allowed the problem to continue for more than 6 months without taking steps to remedy it. In view of Respondent's failure to deal with this problem for several months, I am persuaded the problem was not as serious as portrayed by Boeger and was condoned by Respondent, but that when a majority of Respondent's employees voted in favor of union representation, in defiance of Respondent's announced opposition to the Union, that Respondent seized on the employees' tardiness, which had been condoned in the past, as an excuse to punish them for having voted in favor of union representation. I, therefore, find that Respondent violated Section 8(a)(1) and (3) of the Act, when, on October 7, it issued counseling reports and employee disciplinary notices to 30 employees for coming to work late.

I am also persuaded that when the timing of the implementation of the Respondent's new and more stringent policy of disciplining employees who are late for work on more than 3 days during a payperiod, is considered in the context of Respondent's union animus and the incredible reasons advanced by Respondent for the timing of the policy's implementation, it establishes that the implementation of this new policy was motivated by Respondent's union animus and by its desire to punish the employees for having supported the Union's organizational campaign. I, therefore, find that by implementing a policy on October 7, whereby employees are subject to discipline if they are late on more than three occasions during a payroll period, Respondent violated Section 8(a)(1) and (3) of the Act.[71]

[71] My review of the record convinces me that this violation, which was not alleged in the complaint, was fully and fairly litigated in connection with the complaint's allegation that the counseling reports and employee disciplinary notices issued to 30 employees on October 7, pursuant to this new policy, were discriminatorily motivated.

10. Luisa Yuson's October 1992 discipline

a. *The evidence*

During October Luisa Yuson was employed by Respondent as a CNA on the p.m. shift. She had been employed as a CNA by Respondent since November 1989.

Yuson was one of the 30 employees who, on October 7, were issued either a counseling report or an employee disciplinary notice by Director of Staff Development Boeger for their tardiness; Yuson was issued a counseling report. As I have found supra, Respondent issued these counseling reports and employee disciplinary notices to retaliate against the employees for having voted in favor of union representation, thereby violating the Act.

Yuson was absent from work on vacation from October 18 through October 22. During this time she participated in a union demonstration held in front of Respondent's facility. Yuson was one of several persons who participated in the demonstration by picketing Respondent's facility. A newspaper photographer took her picture on the picket line. It appeared the next day in the local newspaper, apparently in connection with a story about the demonstration.

On October 23, the first day she was back at work from her vacation, approximately 1 hour after she returned, Yuson was disciplined by Boeger, as described below.

(1) Yuson's October 23 discipline[72]

It is standard operating procedure at Respondent's facility not to immobilize a patient with a restraint belt, unless there has been written authorization by a physician to do this, or, if a patient is out of control, the patient may be immobilized with a restraint belt for 1 hour and during this period the Respondent must secure a doctor's authorization to restrain the patient. If a CNA restrains a patient contrary to the above procedures, not only is it a violation of Respondent's standard operating procedure, it constitutes a violation of the regulations regarding patients' restraints enforced by the State of California Health Department.

On October 23, at approximately 3:30 p.m., Boeger observed that CNAs Yuson and Hitosis were about to use a restraint belt to immobilize patient Gladson in a geri-chair and that patient Lammar, who was seated in a geri-chair immediately behind Gladson's, had been immobilized with a restraint belt. Boeger also observed that the medical charts for these patients did not indicate a physician had authorized that they be restrained.

Boeger instructed Yuson and Hitosis not to restrain patient Gladson and asked who, among the CNAs, was responsible for taking care of patient Lammar. Yuson answered that Lammar was her patient, but that Lammar had been restrained by the prior shift, not by Yuson. Boeger reacted by escorting Yuson to Boeger's office, where, with Vera Lacuna, the head of the kitchen and maintenance departments, as a witness, Boeger prepared a written reprimand that she gave to Yuson. The written reprimand, in the form of an em-

[72] Boeger and Yuson testified about Yuson's October 23 discipline. When their testimony conflicts I credited Boeger's. I realize I have found Boeger to be a dishonest witness in connection with her testimony concerning several of the other allegations of the complaint. In this instance, however, Boeger's testimonial demeanor was better than Yuson's.

ployee disciplinary notice, stated that at 3:30 p.m. on October 23 Yuson had restrained a resident in violation of the resident's rights.

Boeger handed this disciplinary notice to Yuson and told her there had been no orders from a physician to restrain either patient Gladson or patient Lammar and despite this Yuson had placed a restraint on Lammar and had been about to do the same to Gladson. Yuson stated she had not placed the restraint on Lammar, refused to sign the written reprimand, and instead wrote on the bottom of the reprimand that she had not placed a restraint on Lammar, but that the day shift personnel had done this. It is undisputed, and I find, that the day shift personnel had restrained Lammar.

Boeger responded to Yuson's explanation by stating that when Yuson began work at 2:45 p.m., she should have realized that patient Lammar should not have been immobilized by a restraint belt because the report that the station's charge nurse gave to Yuson at the start of the shift about the status of Yuson's patients should have alerted Yuson to the fact that there was no physician's authorization to restrain Lammar. Yuson replied that she had not received a report from the charge nurse.

On hearing Yuson say she had not received a report that day from the charge nurse about the status of the patients assigned to her, Boeger immediately prepared and issued to Yuson an employee counseling report that stated in substance that Yuson was being counseled because of an ''unsafe work practice,'' which it described as Yuson's failure to ''receive a thorough report before starting resident care'' that resulted in a resident's ''right'' being violated. Yuson read the counseling report and told Boeger it was not her fault that she had not received a report from the charge nurse because, she explained, the charge nurse had not called Yuson to give her the report.

It is the responsibility of the CNAs to read their patients' medical charts (Tr. 835). If Yuson, on October 23, at the start of the work shift, had checked patient Lammar's medical chart, she would have seen there was no doctor's authorization to restrain Lammar. The record also reveals Yuson would also have discovered this if she had done the following: gotten a report from the charge nurse at the start of the shift about the status of her patients;[73] or, if, at the start of the shift, she had checked the list of her patients, known as the ''run list,'' which indicates whether there has been a doctor's authorization to restrain a patient.

Boeger testified that the restraint of patient Lammar on October 23 by the day shift did not excuse Yuson's conduct because if Yuson had been doing her job the way it was supposed to be performed, by 3:30 p.m. she would have gotten a report from the charge nurse about her patients or have reviewed the ''run list,'' which would have alerted Yuson to the fact that Lammar should not have been restrained.

[73] It is the responsibility of the CNAs to go to the charge nurse at the start of the shift and ask about the status of their patients, at which time the charge nurse gives them a verbal report. Yuson testified that on October 23 she did not ask the charge nurse for the report because she did not want to disturb the charge nurse who, at the start of the shift, was busy dealing with patients' medication.

(2) Yuson's October 26 Discipline

As I have found supra, during the time material, Respondent's workers' compensation claim policy was set forth in a memorandum addressed to its department supervisors posted on the bulletin board in the employees' breakroom. The memo, described in detail supra, provided in substance that in all instances involving work-related injuries, the injured employee must use the Respondent's doctor, Dr. Stuart, for medical treatment for the first 30 days after the injury. CNA Ben Medina testified he had been told by Respondent that if he incurred a work-related injury or illness, that pursuant to Respondent's policy he was obligated to report it to the Respondent and go to Respondent's doctor, Dr. Stuart, for his medical treatment.

On October 24 Yuson notified Respondent she would not be at work that day because she had a doctor's appointment.

On October 24 Yuson was absent from work because she went to an HMO, Kaiser Permanente, for medical treatment. She testified the reason she visited the doctor that day was because of physical and mental stress suffered as the result of the two writeups Boeger had issued to her on October 23. More specifically, she testified that when she got home after work on October 23 she was unable to sleep, was crying, and experienced a pain in her back.

On October 26, when Yuson returned to work after her absence, she was called to the office of Assistant Administrator Laura Smith, the management official who is in charge of administering Respondent's workers' compensation claim policy, when, in the presence of Nursing Director Van Baren and Assistant Nursing Director Rosen, Yuson was given a written reprimand, signed by Smith, in the form of an employee disciplinary notice, which stated:

> You have failed to follow hospital policy-reference to completing an incident report and attend our physician for 30 days. You went to Kaiser and reported a worker comp. injury.
>
> These procedures are covered in your hand book and thru inservices throughout the year-you called in for flu. . . .

When Smith gave Yuson the above-described written reprimand, Yuson stated the reason she was not feeling good had to do with ''everything that was going on with the Union,'' and Smith replied, ''[T]hat's not what we're discussing.'' Smith told Yuson she was mad at Yuson because she had gone to a Kaiser doctor, rather than to Respondent's doctor for a work-related industrial accident. Yuson made no response. Smith then asked why Yuson had gone to Kaiser, rather than to Respondent's doctor for treatment. Yuson replied that when she got home from work on the evening of October 23, she experienced a pain in her back and could not stop crying. Smith stated Yuson had told Respondent she had the flu, Yuson denied this and stated she had told Respondent's clerk only that she would be absent from work due to a doctor's appointment. The meeting ended with Van Baren instructing Yuson to contact Kaiser and to instruct Kaiser to drop Yuson's worker's compensation claim and to ask Kaiser to give Yuson copies of the worker's compensation injury report she had given to Kaiser.

Yuson knew Dr. Stuart was Respondent's doctor, but credibly testified that in her almost 3 years of employment

with Respondent she had never gone to him for medical treatment.

b. *Discussion*

(1) Yuson's October 23 discipline

For the reasons below, I find the General Counsel has established that Respondent's antiunion animus was a motivating factor for its October 23 decision to issue Yuson an employee disciplinary notice and counseling report.

Respondent's hostility to employees who support the Union is evident, as I have found supra, from its discipline and discharge of several employees because of their union activities and sympathies and to discourage employees from supporting the Union. Indeed, as I have found supra, only a few weeks before its October 23 discipline of Yuson, Respondent issued counseling reports and employee disciplinary notices to 30 employees, including Yuson, for the purpose of punishing them because a majority of Respondent's employees had voted in favor of union representation.

Respondent knew Yuson was a prounion activist because, as described supra, only a few days before being disciplined on October 23, Yuson had picketed Respondent's facility in support of the Union's organizational efforts and a picture of her picketing had appeared in a local newspaper.

The timing of the October 23 discipline, occurring on the first day Yuson was at work after having picketed the Respondent's facility on behalf of the Union, lends further support to the conclusion that the decision to discipline her was discriminatorily motivated.

Also supporting this conclusion is the haste in which the decision was made, contrary to Respondent's usual disciplinary procedure. Thus, as I have found supra, whenever one of Respondent's licensed nurses believes an unlicensed nurse has engaged in conduct that warrants discipline, the licensed nurse, whether it is a charge nurse, a shift supervisor, or a department head, must submit the disciplinary notice to the head of the nursing department, Van Baren, who, after independently investigating the situation, decides what, if any, discipline is appropriate. On October 23, however, Boeger disciplined Yuson without consulting Van Baren. Also, Boeger was in such a hurry to discipline Yuson that she disciplined her for allegedly ''restraining a resident [referring to patient Lammar],'' even though Yuson had explained to Boeger it was the personnel on the prior work shift, not Yuson, who had restrained Lammar. Yet, Boeger immediately decided to discipline Boeger, contrary to Respondent's practice of conducting an investigation before deciding to discipline an employee, and contrary to Respondent's practice of having Nursing Director Van Baren decide whether employees in her department are disciplined.

In sum, Respondent knew Yuson was a union activist, Respondent's unfair labor practices demonstrate its antiunion animus, Respondent's discipline of Yuson occurred on the first day she was at work after having picketed Respondent on behalf of the Union, and Respondent was in such a rush to discipline Yuson that it deviated from the usual way in which it decides whether to discipline employees. This evidence supports a prima facie case that Respondent on October 23 reprimanded and counseled Yuson because of her union activity.

Respondent failed to rebut the General Counsel's prima facie case by demonstrating that even absent Yuson's union activity it would have issued her a written reprimand on October 23. Respondent did demonstrate, however, it would have counseled Yuson on that day even absent her union activity. I, therefore, find Respondent violated Section 8(a)(1) and (3) of the Act when it issued an employee disciplinary notice to Yuson on October 23, but did not violate the Act when it counseled her on the same day.

It is evident from the wording of Yuson's October 23 employee disciplinary notice and the counseling report, that the employee disciplinary notice that memorialized the written reprimand issued to Yuson that day, was issued because she allegedly restrained patient Lammar. It was the personnel employed on the prior shift, however, the day shift, not Yuson, who had erroneously restrained patient Lammar and, on October 23, Yuson explained this to Boeger. Boeger ignored Yuson's explanation and decided to summarily discipline Yuson for someone else's conduct and, in doing so, acted contrary to Respondent's usual practice of investigating before imposing discipline and contrary to its usual practice of having Nursing Director Van Baren make the disciplinary decision involving nursing department employees. In view of these circumstances, Respondent has failed to establish that during the normal course of business, even absent Yuson's union activity, Respondent would have issued a written reprimand to Yuson for restraining patient Lammar, after Van Baren had conducted her usual investigation into the misconduct attributed to Yuson in the employee disciplinary notice prepared by Boeger.[74]

Respondent established that even absent Yuson's union activity, Respondent, on October 23, would have counseled Yuson for, as stated in the counseling report, engaging in an ''unsafe work practice'' because ''she did not receive a thorough [sic] report before starting resident care,'' which resulted in her failure to discover that patient Lammar had been erroneously restrained by the day shift. Thus, as I have found supra, if Yuson on October 23 had performed her job the way it was supposed to have been performed, she would have discovered that the day shift had erroneously restrained patient Lammar, and based on this information Yuson presumably would have taken steps to remedy this apparent error. Under the Respondent's system of progressive discipline, Respondent's decision to counsel Yuson was clearly commensurate with her conduct. Thus, even absent her union activity, I am convinced Respondent would have counseled Yuson on October 23 for having failed to perform her job in a satisfactory manner that resulted in her failure to discover that patient Lammar had been erroneously restrained by the prior shift.

[74] As indicated supra, Boeger testified that the reason why the day shift's negligence in restraining patient Lammar did not excuse Yuson's conduct was that if Yuson had done her job, as it was supposed to have been performed on October 23, she would have discovered that the day shift had erred in restraining patient Lammar. Although this testimony explains the basis for the counseling report that Boeger issued to Yuson on October 23, it fails to explain the basis for the employee disciplinary notice that alleges Yuson had restrained patient Lammar.

(2) Yuson's October 26 discipline

As I have found supra, Respondent knew Yuson was a union activist, Respondent's unfair labor practices demonstrate its antiunion animus toward employees known to be union activists, Respondent's October 26 discipline of Yuson occurred shortly after she had picketed Respondent on behalf of the Union and only 3 days after Respondent's discipline of Yuson because of her union activity. This evidence supports a prima facie showing that on October 26 Respondent disciplined Yuson because of her union activity.

As discussed infra, Respondent failed to rebut the General Counsel's prima facie case by establishing it would have disciplined Yuson on October 26, even if she had not been a union activist. I, therefore, find that by disciplining Yuson on October 26 Respondent violated Section 8(a)(1) and (3) of the Act.

As I have found supra, under Respondent's system of progressive discipline, an employee is normally first counseled about the employee's misconduct; the employee is alerted by supervision to the fact that the employee has engaged in an act of misconduct and instructed not to let it happen again. Only if the conduct occurs a second time is the employee given a verbal or written reprimand in the form of an employee disciplinary notice. When on October 24 Yuson violated Respondent's workers' compensation claim policy by going to her own personal physician for medical treatment for a work-related illness, rather than to Respondent's doctor, Respondent issued her a written reprimand in the form an employee disciplinary notice, despite the fact that there is no evidence or contention that in the more than 2 years of her employment with Respondent that Yuson had previously violated the Company's workers' compensation claim policy. Nor did the nature of the violation warrant the more severe discipline of a written reprimand, rather than a counseling report. In this regard, the record reveals that Yuson's conduct did not cause Respondent irreparable injury, inasmuch as when Yuson followed the instructions Van Baren issued to her on October 26—have Kaiser stop processing her worker's compensation claim and send Respondent copies of her worker's compensation claim injury report—Yuson would have remedied her failure to follow the correct worker's compensation claim procedure, at presumably no expense to Respondent. In view of these circumstances, I am convinced that Respondent has failed to establish that during the normal course of business it would have disciplined Yuson, rather than merely counseled her, for having gone to her own personal physician, rather than to the Company's physician, for treatment of a work-related injury.

11. Respondent fails to assign Claire Abella to on-call work and to reemploy her as a full-time employee

a. *The evidence*

Claire Abella was employed by Respondent as a full-time employee from July 1986 until August 1992, first as a nurses aide and then as a CNA. She worked primarily on the p.m. shift. In August, at her request, Respondent changed her status from full-time to on-call employee.

On an undisclosed date Abella began going to school during the day full time. This made it difficult for her to get to work on time inasmuch as her shift started at 2:45 p.m., so, in August, she asked Respondent's director of staff development, Boeger, if she could work part-time. Boeger told her there was no part-time work available, but there was ''on-call'' work available and if Abella wanted to change her status from full-time to on-call employee, she should notify Respondent in writing. Abella gave Boeger a letter that stated she wanted to be employed as an on-call employee because she was attending school. Respondent changed her classification from full-time to on-call employee.

An on-call employee is employed when a full-time employee is unavailable to work the employee's scheduled shift. On those occasions, when Respondent is given sufficient notice that the full-time employee will not be available, Respondent's Staff Coordinator Ellenita Perez has one of Respondent's two clerks, Patricia Sullivan and Emily Martinez, contact an on-call employee to come to work.

As I have found supra, in August, on an undisclosed date, Abella ceased working for Respondent full time and began working for Respondent as an on-call employee. In September she worked in this capacity on 13 different days and there were other days in September when, on being asked to work, she informed Respondent she was unavailable.

As I have found supra, on October 7 Boeger called 30 employees to meet together in her office and issued them written reprimands, in the form of employee disciplinary notices, or counseled them, in the form of counseling reports, for being frequently late for work. Abella was one of the employees at this meeting who received a written reprimand. As I have found supra, Respondent violated the Act when it issued disciplinary notices and counseling reports to the 30 employees, including Abella, because their issuance was motivated by Respondent's antiunion animus and its desire to punish the employees because a majority of them had voted in favor of union representation.

Abella's October 7 written reprimand stated in pertinent part:

> You have been counseled three times regarding tardiness. Again you have been late 3 out of six days worked last pay period. This will be your last warning. If you can not [sic] show up on time for work, you will not be called to come to work.

Respondent presented no evidence to establish, as stated in the written reprimand, Abella had been previously counseled about her tardiness.

When Boeger gave Abella this reprimand to sign, Abella signed it and wrote on the back of the reprimand: ''That's reason why I became on call because I'm going to school but since they are calling me I told them that I will be coming late, and they okayed.'' Boeger read what Abella had written and said nothing.

During the period predating the issuance of the October 7 reprimand, when Respondent's representatives telephoned Abella in the morning to see if she was available that day to work as an on-call employee during the p.m. shift, Abella, more than once, informed the person who called, either Staff Coordinator Perez or desk clerk Sullivan, that she was available to work that day, but because of her school schedule would be late for work, and, in response, either Perez or Sullivan, informed Abella that there was no objection to her coming to work late. The 3 days she was late, referred to

in the October 7 reprimand, were among the days on which, as described above, either Perez or Sullivan assured Abella that Respondent did not object to her being late for work.[75]

On October 7 while at work as an on-call employee, Abella injured herself while lifting a patient. As a result of that injury, she was not available for work until November 13, when Respondent's doctor gave her a medical release authorizing her to return to work. She worked for Respondent on the weekends of November 14, 15, and 21–22. These were the last days Respondent called her to work.

As I have found supra, the Union held demonstrations on September 24 and in mid-October, in front of Respondent's facility, as part of its campaign to organize Respondent's employees. Abella participated in both of those demonstrations by picketing with others in front of the Respondent's facility, on behalf of the Union.

On November 25, when Abella visited Respondent's facility to get her paycheck, she told Boeger she wanted to return to work as a full-time employee. Boeger replied, ''Okay, just put it in writing and give it to Perez.''[76] That same day, Abella gave a letter to Perez in which she asked to be reinstated to full-time employment.

On November 25, after speaking to Abella, Boeger placed the following note in Abella's personnel file: ''Abella has requested to return to full time work. At this time there is no full-time openings. To remain on call.''

According to the testimony of Boeger, who is responsible for hiring nursing department employees, on November 25, after Abella submitted her application for full-time employment and had left the facility, Boeger reviewed the contents of Abella's personnel file and, at that time, based on the contents of the file, decided Abella was not qualified to be reemployed as a full-time employee.

On or about December 3, Abella telephoned Boeger, stated she needed a full-time job and inquired about her previous request to be employed full time. Boeger replied Respondent was unable to employ her full time in December because Boeger had just hired someone else. Boeger ended the conversation by advising Abella to contact her again in January for full-time work.[77]

At the end of each month, Perez, as part of her job as staff coordinator, prepares the work schedule for the next month. It shows who will be employed on which shifts for that month. Late in December or on January 1, 1993, Abella telephoned Perez and asked if she was on the work schedule for January. Perez answered, ''No.'' Abella asked why not. Perez stated Abella would have to speak with Boeger about the matter and she would transfer her telephone call to Boeger's line. Perez then stated Boeger's line was busy, but assured Abella she would give Boeger the message and would have Boeger return Abella's telephone call. Boeger never returned the telephone call.

The above description of Abella's conversation with Perez is based on the testimony of Abella, whose testimonial demeanor was good. Perez testified that when she received a telephone call from Abella about getting back on the work schedule, Perez ''referred her to Julia Boeger.'' I find this warrants the finding that Perez did in fact inform Boeger of Abella's telephone call and of Abella's message. Boeger failed to explain why she did not return Abella's telephone call.

All of Respondent's employees, the on-call as well as the full-time employees, are required by Respondent to have annual chest X-rays and physical exams, which Respondent schedules and pays for. As an on-call employee Abella was required by Respondent in December to have a chest X-ray and on January 19, 1993 to have a physical examination.

On January 19, after taking her physical exam, Abella went to Boeger's office and asked Boeger about the status of her request for full-time employment. Boeger replied she could not employ Abella full time because Boeger had spoken to ''everybody'' and ''they [referring to everybody] would not allow [Abella] to go back full time because [she] had too many writeups.'' Abella replied that in her 6 years of employment with Respondent this was the first time anyone had said anything about the subject of her writeups, and asked if, by stating that ''everyone'' would not allow her to return to work full time, Boeger was referring to Nursing Director Van Baren. Boeger answered, ''everyone,'' and told Abella that even though Respondent could not employ her full time, she would remain in Respondent's employ as an on-call employee.

The above description of Abella's January 19 conversation with Boeger is based on Abella's testimony. Boeger did not specifically deny Abella's testimony. Boeger generally testified, however, that at no time did she ever inform Abella Respondent did not intend to rehire her as a full-time employee. Initially Boeger testified she did not know why she failed to inform Abella of the decision not to hire her as a full-time employee, but then testified her reason for not notifying Abella of this decision was that, ''I'm sensitive. I hate to . . . hurt someone's feelings and tell them that . . . you're fired. I'm not going to tell them that unless I have to.'' I reject Boeger's testimony insofar as it conflicts with Abella's, because Boeger's testimonial demeanor was poor, whereas Abella's was good, and Boeger's testimony that she never informed Abella of Respondent's decision not to rehire her as a full-time employee does not ring true.

It is undisputed that subsequent to Abella's on-call employment on November 21–22, Respondent did not employ her for on-call work, even though work of this nature was available for her to perform during the next several months.

Likewise, it is undisputed that absent its decision not to rehire Abella as a full-time employee, Respondent would have rehired her as a full-time employee, because Boeger testified Respondent had openings for full-time CNAs all of the time ''because we have a big turnover.''

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[75] The findings set forth in this paragraph are based on the testimony of Abella whose testimonial demeanor was good. Abella's testimony was undenied.

[76] This description of Abella's November 25 conversation with Boeger is based on the testimony of Abella whose testimonial demeanor was good.

[77] This description of Abella's December 3 conversation with Boeger is based on the testimony of Abella, whose testimonial demeanor was good. Boeger did not deny Abella's testimony. Quite the opposite, Boeger testified that on or about December 3 she ''could have had'' the above-described conversation with Abella.

b. *Discussion*

(1) Respondent's failure to assign Abella to on-call work

As I have found supra, subsequent to Abella's November 21–22 on-call work assignment, Respondent failed to assign her to any more of this work. The reason Respondent advanced at the hearing for not assigning Abella to do on-call work, subsequent to November 22, was she had indicated to Respondent she was not interested in being assigned to do on-call work. Respondent's Staff Coordinator Perez, testified that by February 1993 she had concluded that Abella was not interested in being assigned on-call work, so at that time Respondent stopped calling Abella. Perez testified her basis for this conclusion was during the preceding months, clerks Sullivan and Martinez told Perez that Abella was never available for work. Perez testified she was unable to remember the number of times Martinez and Sullivan told her this nor could she remember what they said about their efforts to assign Abella to on-call work.

Initially, Perez testified unequivocally that it was Martinez and Sullivan, not Perez, who unsuccessfully attempted to assign on-call work to Abella, and that Martinez and Sullivan informed Perez of their lack of success. According to her initial testimony, Perez was not personally involved in Respondent's efforts to assign Abella on-call work during this period. Later, however, Perez testified that on occasions Perez personally unsuccessfully attempted to assign on-call work to Abella. Perez was unable to remember when this occurred, however, but testified it might have occurred in November or December. Later, when she was again asked if she had spoken to Abella personally about coming to work, Perez first testified she was unsure whether or not she had done so, testifying ''I think I did,'' but then testified ''on some occasions I did'' and further testified that on those occasions Abella, without an explanation, told Perez she was unable to work. Perez testified that the last time she personally unsuccessfully attempted to assign on-call work to Abella was ''maybe November 1992,'' at which time she testified Abella stated she was unable to work.

Abella testified that subsequent to her November 22 work assignment, during November, December and January, she did not receive any calls for work from Respondent, that neither Perez, Martinez or Sullivan offered her work assignments during that period. She further testified that once during this period she asked Perez if work was available for on-call employees, and Perez answered, ''No.''

I reject Perez' above testimony in its entirety because her testimonial demeanor—the tone of her voice and the way she looked, spoke and acted when she gave this testimony—persuaded me she was not an honest or reliable witness, whereas Abella's testimonial demeanor was good. Moreover, the trustworthiness of Perez' testimony is suspect for these additional reasons: Perez' inability to remember what Martinez and Sullivan supposedly told her about their unsuccessful efforts to assign on-call work to Abella; Perez' inability to remember the number of times Martinez and Sullivan supposedly spoke to Perez about their unsuccessful efforts to assign on-call work to Abella; Perez gave conflicting testimony concerning the basis for her belief that Abella was not available for on-call work-Perez initially testified she did not personally unsuccessfully attempt to assign on-call work to Abella, that it was Martinez and Sullivan who did this, but later Perez inconsistently testified that Perez personally unsuccessfully tried to assign on-call to Abella. In view of the aforesaid factors, plus Respondent's failure to call either Martinez or Sullivan to corroborate Perez' testimony, I reject Perez' testimony in its entirety and find, as Abella testified, that following Abella's November 22 work assignment, neither Perez, Sullivan, or Martinez called her for work during November, December, or January 1993 and during this period, when Abella asked Perez if there was work available for on-call employees, Perez answered, ''[N]o.''

Based on the foregoing, I find the reason advanced by Respondent for its failure to assign Abella to on call work subsequent to November 22 is false. I also find, for the reasons below, that the record as a whole warrants the conclusion that it was Abella's union activity that was a motivating factor for Respondent's failure after November 22 to assign Abella to on-call work.

Respondent's hostility toward employees who support the Union is evident, as I have found supra, from its discipline and discharge of several other employees because of their union activity and sympathy. Indeed, as I have found supra, shortly before it abruptly stopped assigning on-call work to Abella, Respondent violated the Act when it issued counseling reports and employee disciplinary notices to 30 employees, one of whom was Abella, for the purpose of punishing them because a majority of Respondent's employees had voted in favor of union representation.

Respondent must have known Abella was a prounion activist because, as I have found supra, on September 24 and again in mid-October, Abella picketed in front of Respondent's facility with other employees, in support of the Union's campaign to organize Respondent's employees.

Abella's picketing on behalf of the Union in front of Respondent's facility and Respondent's antiunion animus, when considered in the context of Respondent's false reason for having abruptly ceased assigning Abella to on-call work, is sufficient to create the inference that Respondent was aware of Abella's union activity and because of its antiunion animus stopped assigning her on-call work. This evidence supports a prima facie case that Respondent's failure, subsequent to November 22, to assign Abella to on-call work was because of her union activity.

Respondent did not advance any business reason, other than the reason that I have found was false, for abruptly ceasing to assign Abella on-call work even if she had not engaged in union activity. I, therefore, find that when, subsequent to November 22, Respondent ceased assigning on-call work to Abella, that by engaging in this conduct it violated Section 8(a)(1) and (3) of the Act.

(2) Respondent's refusal to reemploy Abella full time

On November 25 at approximately the same time it ceased assigning Abella to on-call work because of her union activity, Respondent, when asked by Abella to be reinstated to full-time employment, decided she was no longer qualified to be employed full time, yet failed to inform her of this until January 19, 1993, despite the fact that Abella on December 3 and again on or about January 1 asked about her request to be reinstated to full-time employment. I am convinced that if Respondent really believed it had a legitimate business reason for refusing to reemploy Abella as a full-time employee,

it would not have hesitated to promptly inform her of this decision.

The timing of Respondent's decision not to reemploy Abella as a full-time employee, coming as it did contemporaneously with its decision not to continue to use her as an on-call employee because of her union activity, coupled with Respondent's failure to inform Abella for almost 2 months that it had rejected her request to be reinstated to the position of a full-time employee, persuades me that the General Counsel has made a prima facie showing that Abella's union activity was a motivating factor in Respondent's November 25 decision not to reemploy her full time.

Having found that the General Counsel made a prima facie showing that Abella's union activity was a motivating factor in Respondent's November 25 decision not to reinstate her to her former position of full-time employee, the question presented is whether Respondent has demonstrated it would have refused to reinstate her as a full-time employee even absent her union activity. For the reasons below, I find Respondent has failed to demonstrate this.

On November 25, after Abella had asked Boeger to reinstate her to her former employment status as a full-time employee, Boeger testified she reviewed the contents of Abella's personnel file and decided Abella was not qualified to care for Respondent's patients full time. Boeger testified this decision was based on the contents of the following documents that she testified were in the personnel file: (1) an employee disciplinary notice dated June 5, signed by Boeger, which showed that on that date Abella had received a 3-day suspension for using two diapers on a patient instead of one, as required by Respondent's policy; (2) the employee disciplinary notice, discussed supra, issued by Boeger on October 7 to Abella, which reprimanded her for being late getting to work; (3) a series of one-page ''reports'' entitled ''Late Report'' or ''Absence Report'' that indicated Abella had been late for work once a month in January, February, March, April and June, and three times in July, and had been absent from work once a month during the months of January through May, and that after she began work in August as an on-call employee had been late for work three times; and (4) a written note signed by Boeger, dated October 8, which read as follows:

> Claire Abella called at approx 9:15 am telling me that she needed to see a doctor. That she had hurt her back last night while on duty. She told me that she hurt herself with our resident Mr Webb. That she did not use the hoyer lift like she should of. I told her she needs to see Laura Smith. She also stated that she filled out a Incident report and gave it to Judy the R.N. Supervisor.

Boeger testified there were 9 or 10 employee disciplinary notices in Abella's personnel file. The only ones produced by Respondent were the above-described June 5 and October 7 employee disciplinary notices. Boeger's poor testimonial demeanor when coupled with Respondent's failure to produce any of the other employee disciplinary notices that Boeger supposedly found in Abella's personnel file on November 25, persuades me that either they did not exist or, if they did exist, their production, when viewed in the context of Abella's 6 years of employment with Respondent, would have undermined rather than supported Boeger's testimony.

As I have found supra, the October 7 employee disciplinary notice reprimanding Abella for her tardiness was unlawfully issued because of the union activity of Abella and her fellow employees and to punish the employees because a majority of them had voted for union representation.

Regarding the reports that showed the number of times and dates on which Abella had been late for work in 1992, other than the aforesaid unlawful October 7 written reprimand issued to Abella for her tardiness, Respondent did not reprimand Abella for her tardiness nor is there evidence that Abella's tardiness was excessive under a standard Respondent expected its employees to abide by, especially when, as here, it is undisputed that on the three occasions that Abella was late for work as an on-call employee, Respondent knew she intended to arrive for work late because of her school schedule and had assured her it had no objection to her being late on those days.

Regarding the reports that showed the number of times and dates on which Abella was absent from work in 1992, there is no contention or evidence that Abella was ever reprimanded for her absenteeism or that it was excessive under a standard Respondent expected its employees to abide by.

Regarding Boeger's October 8 note about Abella's on-the-job injury, there is no contention or evidence that Abella was reprimanded or even spoken to in a critical manner about her failure to use the ''hoyer lift'' to physically lift the patient. Even more significant, however, is the fact that the record establishes Boeger wrote the note, not for purposes of discipline, but to notify Assistant Administrator Smith, who administers Respondent's worker's compensation claim program, that Smith needed to send Abella to Respondent's physician for medical treatment pursuant to Respondent's worker's compensation claim program (Tr. 1743).

Boeger, throughout her testimony made it appear that she decided not to reinstate Abella to a full-time position. As I have found supra, however,on January 19, 1993 when Boeger belatedly informed Abella that she was not eligible for full-time employment because she had too many writeups, Boeger explained to Abella that ''everybody'' was responsible for this decision. Also, when asked during the hearing if she was the person who decided that Abella was not qualified to work full time, Abella testified she was only ''one of the people'' who made that decision. Respondent called none of the other persons who, with Boeger, participated in making the decision not to reemploy Abella as a full-time employee.

In summation, as I have discussed supra, a significant part of Boeger's reason for deciding not to reemploy Abella as a full-time employee does not withstand scrutiny.[78] This fac-

[78] This conclusion is further supported by Abella's frequent employment as an on-call employee by Respondent prior to November 25. I find it difficult to believe that if Boeger really believed Abella's employment record made her ineligible to care for Respondent's patients full time, that Boeger would have permitted Respondent to employ her so frequently as an on-call employee. Boeger was unable to explain this; when asked why Abella was employed on an on-call basis if her poor work record made her ineligible to work full time, Boeger was unable to give an explanation

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tor when coupled with Boeger's poor demeanor when she testified about her reason for deciding not to reemploy Abella as a full-time employee and with Respondent's failure to call the person or persons, who, with Boeger, participated in the decision not to reemploy Abella as a full-time employee, persuade me that Respondent has not demonstrated it would have refused to reemploy Abella as a full-time employee even absent her union activity. I, therefore, find that by failing to reemploy Abella as a full-time employee on December 20, 1992, because of her union activity, that Respondent violated Section 8(a)(1) and (3) of the Act.[79]

12. In 1992 Respondent allegedly discontinues its past practice of providing a free meal for its employees on Thanksgiving Day

The complaint alleges that in 1992 Respondent, in violation of Section 8(a)(3) and (1) of the Act, ''discontinued its past practice of providing a free meal for its employees on Thanksgiving Day.'' Counsel for the General Counsel in his posthearing brief fails to point to the evidence that establishes this alleged violation nor does he request that I find Respondent violated the Act by engaging in this conduct, and, my review of the record failed to locate evidence that establishes that in 1992 Respondent discontinued a past practice of providing a free Thanksgiving Day dinner to its employees. Therefore, I shall recommend the dismissal of this allegation.

D. *The Alleged Violations of Section 8(a)(5) and (1) of the Act*

As set forth in detail supra, on September 25, 1992, a majority of Respondent's employees in an appropriate unit voted in favor of union representation in a Board-conducted representation election, Respondent filed timely objections to the conduct of the election, and, on April 8, 1994, in an unpublished opinion in Case 32–RC–3596, the Board adopted my July 14, 1993 report that recommended that Respondent's objections be overruled and the Union be certified. Accordingly, on April 8, 1994, the Board in Case 32–RC–3596 certified the Union as the exclusive collective-bargaining representative of the unit employees.

It is settled law that when, as here, a majority of the voting unit employees cast their ballots in favor of union representation that a unilateral change in the employees' terms and conditions of employment made pending determination of the employer's objections to the election have the effect of bypassing and undermining the union's status as the employees' bargaining representative, in the event it is ultimately certified. Thus, the employer acts at its peril in making unilateral changes during this period and, if the union is ultimately certified, as it was in this case, the employer's unilateral changes violate Section 8(a)(5) and (1) of the Act, in the absence of a showing of compelling economic considerations. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974).

1. On October 7, 1992, Respondent implements a new policy governing the discipline of employees for tardiness

As I have found supra, on October 7, Respondent violated Section 8(a)(3) and (1) of the Act by instituting a new and more stringent policy of disciplining employees who were late for work, by subjecting them to discipline if they were late on more than three occasions during a payroll period. This change in policy was a significant and substantial change in the employees' terms and conditions of employment. It is undisputed that prior to implementing this new policy Respondent did not afford the Union an opportunity to bargain about the decision and its effects on the unit employees, because Respondent was contesting the Union's election victory. As discussed supra, however, by acting unilaterally in this matter, the Respondent acted at its peril inasmuch as its objections to the election were ultimately overruled and the Union was certified as the employees' exclusive collective-bargaining representative. I, therefore, find that Respondent refused to bargain with the Union within the meaning of Section 8(a)(5) of the Act when, on October 7, 1992, it unilaterally instituted a new and more stringent policy of disciplining employees who were late for work on more than three occasions during a payroll period. By engaging in this unilateral conduct Respondent violated Section 8(a)(5) and (1) of the Act.

I considered that this violation was not specifically alleged in the complaint that, in pertinent part, alleged that on October 7 Respondent refused to bargain within the meaning of Section 8(a)(5) when it ''effectuated a change in its employee tardiness policy regarding school class attendance,'' without affording the Union an opportunity to bargain about the matter. My review of the record, however, has persuaded me that the violation found herein was fully and fairly litigated in connection with this allegation and with the complaint's further allegation that on October 7, in violation of Section 8(a)(3) and (1) of the Act, Respondent issued counseling reports and employee disciplinary notices to 30 employees because of their union activities. In defending against these allegations Respondent presented evidence that established that 30 employees on October 7 were counseled and disciplined pursuant to a new policy that was implemented on that day by Respondent's director of staff development, Boeger, pursuant to which Respondent's employees were subject to discipline if they were late for work on more than 3 days during a payroll period.

2. In 1992 Respondent allegedly discontinues its past practice of providing a free Thanksgiving Day meal for its employees

The complaint alleges that in 1992 Respondent refused to bargain within the meaning of Section 8(a)(5) by unilaterally discontinuing its past practice of providing a free meal to its employees on Thanksgiving Day. Counsel for the General Counsel in his posthearing brief fails to point to the evidence that establishes this alleged violation nor does he request that I find Respondent violated the Act by engaging in this conduct, and, my review of the record failed to locate evidence

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and when she apparently realized there was no valid explanation lost her composure (Tr. 1790–1791).

[79] On December 20 two newly hired CNAs began work full time for Respondent on its p.m. shift. Any uncertainty whether during the normal course of business Abella would have been selected to fill one of those vacancies must be resolved against Respondent in view of the uncertainty caused by its unlawfully motivated decision on November 25 not to reemploy Abella as a full-time employee.

that establishes that in 1992 Respondent discontinued a past practice of providing a free Thanksgiving Day dinner to its employees. Therefore, I shall recommend the dismissal of this allegation.

3. On May 27, 1993, Respondent changes its vacation policy for the night shift

Respondent's policy concerning the scheduling of employees' vacations, which has been in effect since at least June 1, 1990, is set forth in a handbook given to newly hired employees, and reads, in pertinent part, as follows:

> While vacations may be scheduled during any month of the year, employees will be asked to state their written preference for vacation dates. . . . Should conflicts in scheduling occur, Administration has the right to determine the number of people who will be on vacation at any one time and the amount of vacation that can be taken.

Alfredo Flores and his wife have been employed by Respondent since June 1989 as CNAs on the night shift. In 1990, 1991, and 1992 Alfredo Flores, on behalf of himself and his wife, submitted to Respondent joint vacation requests that understandably asked that husband and wife be scheduled for their vacations at the same time. These requests were granted, without objection, and in 1990, 1991, and 1992 the Floreses took their vacation from work at the same time.

In May 1993, Alfredo Flores, on behalf of himself and his wife, submitted their 1993 vacation request. As usual, it requested that their vacations be scheduled for the same time. In response, the Floreses received a memo dated May 25, 1993, from Boeger, Respondent's director of staff development, which read as follows:

> I am granting one of your vacation request. Due to the hardship it would create to night shift, if both of you were to be on vacation at the same time. Please decide which one of you would like to be off from July 5th to the 25th and I will approve it. The other will need to choose another vacation date at a later time.

Alfredo Flores protested Respondent's refusal to allow him and his wife to take their vacation together and submitted another vacation request on behalf of himself and his wife, again requesting their vacations be scheduled for the same time. This time Boeger granted the Floreses request but not for as many days as they had requested. Boeger's May 27, 1993 memo to the Floreses granting their request, stated in pertinent part:

> I have granted you your third choice of vacation days. *Please remember that in the future no more than one CNA on vacation at a time on night shift.* We will consider a short overlap (emphasis added).

Boeger testified that in her May 27 memo, when she stated ''in the future no more than one CNA on vacation at a time on night shift,'' she was following the company policy described previously in this decision that states, in pertinent part, that ''should conflicts in [vacation] scheduling occur, Administration has the right to determine the number of people who will be on vacation at any one time and the amount of vacation which can be taken.''

Boeger also testified that on May 27 when she told the Floreses that in the future no more than one CNA employed on the night shift would be allowed to go on vacation at the same time, she was informing them about an existing company policy. She admitted this policy had not been reduced into writing and, when asked if it was a practice, testified ''*for me*, yes it was'' (emphasis added). I reject this testimony. I am convinced that Boeger's May 27 announcement that in the future no more than one CNA employed on the night shift would be allowed to take their vacation at the same time was an announcement of a new policy. The basis for this conclusion follows.

The wording of the May 27 announcement, ''in the future no more than one CNA on vacation at a time on night shift,'' indicates that in the past this had not been the policy. If it had been, Boeger would have reminded the Floreses of this, instead of telling them that ''in the future'' it would be the policy. Moreover, in 1990, 1991, and 1992, the Floreses took their vacations together, without objection. Respondent failed to explain why, if its policy was to refuse to permit more than one night-shift CNA to vacation at the same time, it had always allowed the Flores to do this. Also significant in evaluating Boeger's testimony that prior to May 27 it had been her practice to refuse to allow more than one night-shift employee to vacation at a time, is the lack of corroboration for this testimony. This lack of corroboration is significant because of Boeger's poor testimonial demeanor when she testified about this matter.

It is for all of the above reasons that I reject Boeger's testimony and find that on May 27, 1993, when Boeger told the Floreses that ''in the future no more than one CNA on vacation at a time on night shift,'' Respondent was instituting a new policy that constituted a significant and substantial change in the employees' terms and conditions of employment.

Prior to implementing this new policy, Respondent did not afford the Union an opportunity to bargain about the decision to implement it and about its effect on the unit employees, because the Respondent was contesting the Union's election victory. As discussed supra, however, Respondent acted at its peril inasmuch as its objections to the election were ultimately overruled and the Union was certified as the employees' exclusive collective-bargaining representative. I, therefore, find that Respondent refused to bargain with the Union within the meaning of Section 8(a)(5) of the Act when, on May 27, 1993, it unilaterally instituted a new policy whereby no more than one CNA employed on the night shift could go on vacation from work at the same time. I further find that by engaging in this unilateral conduct Respondent violated Section 8(a)(5) and (1) of the Act.

4. In October 1992 Respondent raises its employees' wages

Prior to 1992, for the past ''few years'' Respondent had granted its employees a wage increase in or about August because it was during that time of the year Respondent received its Medi-Cal insurance payments from the State of California, which cover approximately 60 percent of Respondent's residents. The State requires that a small percentage of this money be paid to the employees in the form of

a wage increase. There is no evidence, however, that the State dictates the amount of the pay raise that Respondent must grant to the employees. To the contrary, Respondent's President M. Shenker testified it is Respondent that decides on the amount of the pay raise (Tr. 2041, L. 9–10).

In 1992, because of budgetary problems, the State of California for several weeks, in the months of July and August, paid its creditors, including Respondent, with IOUs, which some banks refused to honor. The result was Respondent was forced to borrow money and instead of granting its employees their annual wage increase in or about August did not do so until October. Although the October pay raise was granted pursuant to the Company's policy of annually adjusting the employees' wages, there is no evidence Respondent relied on preestablished guidelines or formulae in deciding whether to grant the increase or in determining its size. As I have noted supra, although a certain amount of the wage increase was dictated by the amount of the Medi-Cal insurance payment Respondent received from the State, it was Respondent that determined the amount of the pay raise.

As I have discussed supra, an employer acts at its peril when it fails to bargain with a union about changes in employees' terms and conditions of employment during the period when the employer is contesting the union's election victory, when the Board ultimately certifies the union as the employees' exclusive collective-bargaining representative. In the instant case, since Respondent was contesting the Union's election victory it failed to afford the Union an opportunity to bargain with Respondent about Respondent's decision to increase the unit employees wages in October 1992 or about the effect of that decision on the employees. Although this wage increase was granted pursuant to the Company's policy of annually adjusting the employees' wages, there is no evidence Respondent relied on preestablished guidelines or formulae in determining whether to grant the wage increase or in determining its size.[80] Under the circumstances, I find that by unilaterally increasing the wages of the unit employees in October 1992, Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.[81]

CONCLUSIONS OF LAW

1. By asking employees Lodring Ignacio and Joanne Mejia, during the latter part of July 1992 to report to the Respondent about the union sentiments and union activities of other employees, Respondent violated Section 8(a)(1) of the Act.

2. By videotaping its employees' union activity on September 24, 1992, Respondent violated Section 8(a)(1) of the Act.

3. By discharging Carol Bagley on August 12, 1992, because she refused to commit unfair labor practices against statutory employees, Respondent violated Section 8(a)(1) of the Act.

4. By discharging the employees named below on the dates beside their names because of their prounion sentiments or union activity or because it believed they were union adherents, and/or to discourage Respondent's employees from supporting the Union, Respondent violated Section 8(a)(3) and (1) of the Act:

Annie Maria	July 1, 1992
Fe Calabiao	July 22, 1992
Estella Abueg	July 22, 1992
Ethel Tarrosa	July 22, 1992
Angelito Bellon	July 27, 1992
Caridad Guzman	September 20, 1993

5. By suspending the employees named below on the dates aside of their names because of their prounion sentiments or union activity or because it believed they were union adherents and/or to discourage Respondent's employees from supporting the Union, Respondent violated Section 8(a)(3) and (1) of the Act:

Joanne Mejia	July 22, 1992
Florencio Baldoza	July 22, 1992
Irineo Llever	September 4, 1992
Caridad Guzman	February 19, 1993
Benjamin Medina	March 22, 1993

6. By deciding to suspend employees Lodring Ignacio and Irineo Llever on July 22, 1992, because of their prounion sentiments or union activity or because it believed they were union adherents or because it desired to discourage its employees from supporting the Union, and by notifying Ignacio and Llever that they had been suspended, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By issuing disciplinary notices to employees Benjamin Medina on September 22 and October 26, 1992 and January 28 and March 22, 1993, because of his prounion sentiments and union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

8. By issuing a disciplinary notice to Luisa Yuson on October 23, 1992, and another disciplinary notice to her on October 26, 1992, because of her prounion sentiments and union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

9. By issuing counseling reports and disciplinary notices to 30 employees on October 7, 1992, for being late for work in order to punish its employees for having supported the Union and to discourage them from supporting the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

10. By instituting a new and more stringent policy on October 7, 1992, for disciplining employees who were late for work and by engaging in this conduct for the purpose of punishing its employees for having supported the Union and to discourage them from supporting the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

11. By failing and refusing to assign on-call work to employee Claire Abella subsequent to November 22, 1992, and by failing and refusing to reemploy Abella as a full-time employee on December 20, 1992, and by engaging in the aforesaid conduct because of Abella's prounion sentiments and union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

12. The Union is the exclusive representative of Respondent's employees in the following unit that is appropriate for

[80] If the October 1992 wage increase was granted pursuant to nondiscretionary standards and guidelines, it is reasonable to assume Respondent would have produced such evidence since it is the type of evidence particularly within its knowledge.

[81] The complaint does not allege nor does the General Counsel contend that Respondent violated the Act by its delay in granting the October wage increase.

collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees, including LVNs, CNAs, Dietary, Laundry, and Housekeeping employees, Sterilization Workers, Restorative Aides, and Maintenance employees employed by the [Respondent] at its Concord, California facility; excluding all professional employees, office clerical employees, guards, and supervisors as defined in the Act.

13. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or bargaining with the Union, changing the unit employees' existing terms and conditions of employment, as follows: on October 7, 1992, instituted a new and more stringent policy of disciplining employees who are late for work, in October 1992 granted the employees a pay raise; and, on May 27, 1993, instituted a new policy pursuant to which no more than one CNA employed on the night shift may be scheduled for vacation at the same time.

14. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

15. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend a remedial order requiring Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent's misconduct is so egregious and widespread as to demonstrate a general disregard for employees' rights, I shall include in my recommended Order a broad cease-and-desist provision.

Having found that Respondent on October 7, 1992, violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a new and more stringent policy of disciplining employees who are late for work, and having further found that this policy was instituted for the purpose of punishing the Respondent's employees for having voted for union representation, thereby violating Section 8(a)(3) and (1) of the Act, I shall order the Respondent to rescind and cease giving effect to this policy and to remove from its records, including the employees' personnel files, all warnings and reports that have been given as a result of the changed policy, and to inform each of the employees, in writing, that such references have been removed and that these warnings and reports will not be used as a basis for further personnel actions concerning any of them.

To remedy the discharges found unlawful in this decision, the Respondent shall offer Carol Bagley, Annie Mariano, Fe Calabiao, Estella Abueg, Ethel Tarrosa, Angelito Bellon, and Caridad Guzman immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits suffered as a result of the Respondent's unlawful conduct. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the suspensions found unlawful in this decision, Respondent shall make whole Joanne Mejia, Florencio Baldoza, Irineo Llever, Caridad Guzman, and Benjamin Medina, for any loss of earnings and benefits suffered as a result of their unlawful suspensions, plus interest.

Having unlawfully issued disciplinary notices to Benjamin Medina on September 22 and October 26, 1992, and on January 28 and March 22, 1993, and having unlawfully issued a disciplinary notice to Luisa Yuson on October 23, 1992, and another unlawful disciplinary notice to Yuson on October 26, 1992, the Respondent shall be ordered to remove from its records, including the employees' personnel files, any reference to these warnings and shall inform each of these employees, in writing, that such references have been removed and that these warnings will not be used as a basis for future personnel actions concerning any of them.

To remedy its unlawful failure and refusal to assign on-call work to Claire Abella subsequent to November 25, 1992, and to remedy its unlawful failure and refusal to reemploy Claire Abella as a full-time employee on December 20, 1992, Respondent shall immediately offer to reemploy Abella as a full-time employee and to make her whole for any loss of earnings and benefits suffered as a result of Respondent's aforesaid discrimination against her. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, supra, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act on May 27, 1993, by unilaterally, without notice to or bargaining with the Union, instituting a policy pursuant to which no more than one CNA employed on the night shift may be scheduled for vacation at the same time, I shall recommend that Respondent be ordered to rescind this unilateral change in the employees' working conditions until such time as it negotiates in good faith with the Union about this subject to an impasse or until an agreement is reached.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[82]

ORDER

The Respondent, Casa San Miguel, Incorporated, Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees to report to Respondent about the union sympathies and activities of other employees.

(b) Photographing or videotaping employees engaged in union activities without proper justification.

(c) Discharging supervisors because they fail or refuse to commit unfair labor practices against statutory employees.

(d) Discharging, refusing to reemploy, or disciplining employees because of their prounion sentiments or union activities.

(e) Refusing to bargain collectively with the Union by making unilateral changes in the wages and other terms and

[82] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

conditions of employment of the employees represented by the Union.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carol Bagley, Annie Mariano, Fe Calabiao, Estella Abueg, Ethel Tarrosa, Angelito Bellon, and Caridad Guzman, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and benefits suffered as a result of their discharges, in the manner set forth in the remedy section of the decision.

(b) Make whole Joanne Mejia, Florencio Baldoza, Irineo Llever, Caridad Guzman, and Benjamin Medina, for the loss of earnings they suffered as a result of their unlawful suspensions from work, plus interest.

(c) Offer Claire Abella immediate reemployment as a full-time employee and make her whole for any loss of earnings and benefits suffered as a result of Respondent's unlawful failure to reemploy her as a full-time employee and its previous unlawful failure to assign her to on-call work; backpay to be computed in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to the unlawful discharges of Bagley, Mariano, Calabiao, Abueg, Tarrosa, Bellon and Guzman, the unlawful suspensions of Mejia, Baldoza, Llever, Guzman, and Medina, and the unlawful refusal to reemploy Abella as a full-time employee, and notify each of them in writing that this has been done and that Respondent will not use the discharges, suspensions and refusal to reemploy against them in any way.

(e) Remove from its records, including the employees' personnel files, any reference to the unlawful disciplinary notices issued to Benjamin Medina on September 22 and October 24, 1992, and on January 28 and March 22, 1993, and any reference to the unlawful disciplinary notices issued to Luisa Yuson on October 23 and October 26, 1992, and notify Medina and Yuson, in writing, that this has been done and that Respondent will not use these notices against them in any way.

(f) Rescind and cease giving effect to its unlawful policy of disciplining employees who are late for work that was instituted on October 7, 1992, and remove from its records, including the employees' personnel files, all warnings, reports or disciplinary notices that were given as a result of this policy, including the 30 counseling reports and disciplinary notices issued October 7, 1992, and inform each of the employees, in writing, that such references have been removed and that these warnings, reports and notices will not be used as a basis for further personnel actions concerning any of them.

(g) Until such time as it negotiates in good faith with the Union to an impasse or until an agreement is reached, rescind the policy that no more than one CNA employed on the night shift may be scheduled for vacation at the same time.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its facility in Concord, California, copies of the attached notice marked ''Appendix.''[83] Copies of this notice shall be in English and Tagalog, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints herein shall otherwise be dismissed.

[83] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT ask our employees to report to us about the union sympathies or union activities of other employees.

WE WILL NOT, without proper justification, photograph or videotape employees who are engaged in union activities.

WE WILL NOT discharge a supervisor because the supervisor fails or refuses to commit unfair labor practices against rank-and-file employees.

WE WILL NOT discharge, refuse to reemploy, or discipline employees because of their prounion sentiments or union activities.

WE WILL NOT refuse to bargain collectively with Hospital and Health Care Workers, Local 250, SEIU, AFL–CIO by making unilateral changes in the wages or other terms and conditions of employment of the employees represented by that union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Carol Bagley, Annie Mariano, Fe Calabiao, Estella Abueg, Ethel Tarrosa, Angelito Bellon, and Caridad Guzman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make whole Joanne Mejia, Florencio Baldoza, Irineo Llever, Caridad Guzman, and Benjamin Medina for the loss of earnings resulting from their unlawful suspensions, plus interest.

WE WILL offer Claire Abella immediate reemployment as a regular full-time employee and WE WILL make Abella whole for any loss of earnings and benefits resulting from our unlawful failure to reemploy her as a regular full-time employee and to previously assign her to on-call work, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharges of Carol Bagley, Annie Mariano, Fe Calabiao, Estella Abueg, Ethel Tarrosa, Angelito Bellon, and Caridad Guzman, the unlawful suspensions of Joanne Mejia, Florencio Baldoza, Irineo Llever, Caridad Guzman, and Benjamin Medina, and the unlawful refusal to reemploy Claire Abella as a regular full-time employee, and WE WILL notify each of them, in writing, that this has been done and that WE WILL NOT use the discharges, suspensions and refusal to reemploy, against them in any way.

WE WILL remove from our files any reference to the unlawful disciplinary notices issued to Benjamin Medina on September 22 October 24, 1992, January 28 and March 22, 1993, and any reference to the unlawful disciplinary notices issued to Luisa Yuson on October 23 and October 26, 1992, and WE WILL notify each of them, in writing, that this has been done and that WE WILL NOT use these disciplinary notices against them in any way.

WE WILL rescind and cease giving effect to our unlawful policy of disciplining employees who are late for work that was instituted on October 7, 1992, and remove from our records all warnings, reports or disciplinary notices that were issued to employees as a result of this policy, including the 30 counseling reports and disciplinary notices issued on October 7, 1992, and WE WILL notify each of the employees, in writing, that such references have been removed and that these warnings, counseling reports and disciplinary notices will not be used as a basis for further personnel actions concerning any of them.

WE WILL, until such time as we negotiate in good faith with Hospital and Health Care Workers, Local 250, SEIU, AFL–CIO to an impasse or until an agreement is reached, rescind our policy that no more than one CNA employed on the night shift may be scheduled for vacation at the same time.

CASA SAN MIGUEL, INCORPORATED